No. 04-1144

Title: Kelly A. Ayotte, Attorney General of New Hampshire, Petitioner
v.
Planned Parenthood of Northern New England, et al.

Docketed: February 28, 2005
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (04-1161)
Decision Date: November 24, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 22 2005	Petition for a writ of certiorari filed. (Response due March 30, 2005)
Mar 14 2005	Order extending time to file response to petition to and including April 15, 2005.
Mar 23 2005	Brief amici curiae of New Hampshire Legislators filed.
Apr 13 2005	Brief of respondents Planned Parenthood of Northern New England, et al. in opposition filed.
Apr 26 2005	DISTRIBUTED for Conference of May 12, 2005.
May 16 2005	DISTRIBUTED for Conference of May 19, 2005.
May 23 2005	Petition GRANTED.
Jun 23 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 8, 2005.
Jun 23 2005	Extension of time within which to file respondents' brief on the merits to and including October 12, 2005.
Jul 1 2005	Motion to allow Counsel Alan Ernest to represent Children Unborn and Born Alive filed..
Jul 1 2005	Brief amicus of Legal Defense For Unborn Children filed.
Jul 25 2005	SET FOR ARGUMENT on November 30, 2005.
Jul 29 2005	Brief amicus curiae of Rutherford Institute filed.
Aug 4 2005	Brief amici curiae of United States Conference of Catholic Bishops,et al. filed.
Aug 4 2005	Brief amici curiae of New Hampshire Representative and HB 763 Sponsor Kathleen Souza, et al. filed. (Distributed)
Aug 4 2005	Brief amicus curiae of Thomas More Society filed. (Distributed)
Aug 5 2005	CIRCULATED.
Aug 5 2005	Brief amicus curiae of Liberty Counsel filed. (Distributed)
Aug 5 2005	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. (Distributed)
Aug 5 2005	Brief amici curiae of Margie Riley and Laurette Elsberry filed. (Distributed)

Aug 8 2005	Brief amicus curiae of United States filed. (Distributed)
Aug 8 2005	Brief amici curiae of Maureen Curley, et al. filed. (Distributed)
Aug 8 2005	Brief amici curiae of Family Research Council and Focus on the Family filed. (Distributed)
Aug 8 2005	Brief amici curiae of Association of American Physicians & Surgeons and John M. Thorp, Jr. filed. (Distributed)
Aug 8 2005	Brief amici curiae of New Hampshire Legislators filed. (Distributed)
Aug 8 2005	Brief amicus curiae of American Center for Law Justice filed. (Distributed)
Aug 8 2005	Brief amicus curiae of University Faculty for Life filed. (Distributed)
Aug 8 2005	Brief amici curiae of Loren Leman, et al. filed. (Distributed)
Aug 8 2005	Brief amici curiae of Harlon Reeves, et al. filed. (Distributed)
Aug 8 2005	Brief amici curiae of James P. Weiers, et al. filed. (Distributed)
Aug 8 2005	Brief amici curiae of American Association of Pro Life Obstetricians and Gynecologists, et al. filed. (Distributed)
Aug 8 2005	Brief amicus curiae of National Legal Foundation filed. (Distributed)
Aug 8 2005	Brief amicus curiae of Horatio R. Storer Foundation, Inc. filed. (Distributed)
Aug 8 2005	Joint appendix filed. (Distributed)
Aug 8 2005	Brief amici curiae of Texas, et al. filed. (Distributed).
Aug 8 2005	Brief of petitioner Kelly A. Ayotte, Attorney General of New Hampshire filed. (Distributed)
Aug 15 2005	Motion for leave to file amici curiae brief out of time filed by Tim Pawlenty, Governor of Minnesota, et al. (Distributed)
Aug 22 2005	Motion to allow Counsel to represent Children Unborn and Born ALive DENIED.
Sep 23 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 3 2005	Motion of Tim Pawlenty, Governor of Minnesota, et al. for leave to file amici curiae brief out of time GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Oct 12 2005	Brief amici curiae of National Coalition Against Domestic Violence, et al. filed. (Distributed)
Oct 12 2005	Brief amici curiae of Terie Norelli and Over One Hundred Other State Legislators filed. (Distributed)
Oct 12 2005	Brief amici curiae of Naral, Pro-Choice America Foundation, et al. filed. (Distributed)
Oct 12 2005	Brief amici curiae of American College of Obstetricians and Gynecologists, et al. filed. (Distributed)
Oct 12 2005	Brief amicus curiae of Organizations Committed to Women's Equality filed. (Distributed)
Oct 12 2005	Brief amicus curiae of John H. Lynch, Governor filed. (Distributed)

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No. _____

OFFICE OF THE CLERK

In The
Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND, CONCORD FEMINIST
HEALTH CENTER, FEMINIST HEALTH CENTER
OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States First Circuit Court of Appeals apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the *undue burden standard* cited in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) applied rather than the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?

2. Whether the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2003) preserves the health and life of the minor through the Act's judicial bypass mechanism and/or other state statutes?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioner is Kelly A. Ayotte[1], Attorney General of the State of New Hampshire, who was sued in her official capacity.

Respondents are Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.

[1] Respondents initially sued Peter Heed, Attorney General of the State of New Hampshire, in the United States District Court for the District of New Hampshire in November, 2003. Kelly Ayotte became Attorney General in July, 2004.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of *Certiorari* issue to the United States Court of Appeals for the First Circuit to review the judgment in this case filed on November 24, 2004.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 390 F.3d 53 (1st Cir. 2004). It is set forth in the Appendix at App. 1-App. 23. The order of the United States District Court for the District of New Hampshire holding New Hampshire's Parental Notification Prior to Abortion Act unconstitutional and enjoining its enforcement is reported at 296 F.Supp. 2d 59, and is set forth in the Appendix at App. 24-App. 40.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on November 24, 2004.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (2002) to review a civil judgment.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Parental Notification Prior to Abortion

[*RSA 132:24 effective December 31, 2003.*]

132:24 Definitions In this subdivision:

I. "Abortion" means the use or prescription of any instrument, medicine, drug or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

II. "Commissioner" means the commissioner of the department of health and human services.

III. "Department" means the department of health and human services.

IV. "Emancipated minor" means any minor female who is or has been married or has by court order otherwise been freed from the care, custody and control of her parents.

V. "Guardian" means the guardian or conservator appointed under RSA 464-A, for pregnant females.

VI. "Minor" means any person under the age of 18 years.

VII. "Parent" means one parent of the pregnant girl if one is living or the guardian or conservator if the pregnant girl has one.

HISTORY

Source: 2003, 173:2, eff. Dec. 31, 2003

[*RSA 132:25 effective December 31, 2003.*]

132:25 Notification Required

I. No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

II. The written notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

III. In lieu of the delivery required by paragraph II, notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and with restricted delivery to the addressee, which means the postal employee shall only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

HISTORY

Source: 2003, 173:2, eff. Dec. 31, 2003

[*RSA 132:26 effective December 31, 2003.*]

132:26 Waiver of Notice

I. No notice shall be required under RSA 132:25 if:

(a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is

necessary to prevent the minor's death and there is insufficient time to provide the required notice; or

(b) The person or persons who are entitled to notice certify in writing that they have been notified.

II. If such a pregnant minor elects not to allow the notification of her parent or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests and shall authorize an abortion provider to perform the abortion without such notification if said judge concludes that the pregnant minor's best interests would be served thereby.

(a) Such a pregnant minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.

(b) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor. In no case shall the court fail to rule within 7 calendar days from the time the

petition is filed. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(c) An expedited confidential appeal shall be available to any such pregnant minor for whom the court denies an order authorizing an abortion without notification. The court shall make a ruling within 7 calendar days from the time of the docketing of the appeal. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant minor at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant minor 24 hours a day, 7 days a week.

HISTORY

Source: 2003, 173:2, eff. Dec. 31, 2003

[*RSA 132:27 effective December 31, 2003.*]

132:27 Penalty. Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bona fide and true, or if the

person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

HISTORY

Source: 2003, 173:2, eff. Dec. 31, 2003

[*RSA 132:28 effective December 31, 2003.*]

132:28 Severability. If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications, and to this end, the provisions of this subdivision are severable.

HISTORY

Source: 2003, 173:2, eff. Dec. 31, 2003

STATEMENT OF THE CASE

In June, 2003, the New Hampshire Legislature passed the Parental Notification Prior to Abortion Act (Act) with an effective date of December 31, 2003. N.H. Rev. Stat. Ann. (RSA) 132:24-28. The Act defines abortion to mean:

> The use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with the intention other than to increase the probability of a live birth, to preserve the life or health of a child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

N.H. RSA 132:24, I

The Act also provides that no abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed until at least 48 hours after written notice has been delivered to the parent at the usual place of abode of the parent by the physician or an agent or notice is made by certified mail to the parent at the usual place of abode of the parent with return receipt requested and with restricted delivery to the addressee. N.H. RSA 132:25.

No notice is required if the attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice or the persons who are entitled to notice certify in writing that they have been notified. N.H. RSA 132:26, I, II. If the minor chooses not to notify her parent or guardian, a judicial bypass procedure is available where a judge may authorize an abortion provider to perform an abortion if the judge concludes that the pregnant minor's best interests would be served. If the judicial bypass procedure is used, the pregnant minor may participate in the court on her own behalf and the court may appoint a guardian ad litem for her. The court must advise her that she has the right to court-appointed counsel and must provide her one upon her request. Proceedings in court shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the minor. An expedited confidential appeal is available to any pregnant minor for whom the court denies an order authorizing an abortion without notification. Access to the courts is afforded 24 hours a day, 7 days a week. N.H. RSA 132:26, II.

Performance of an abortion in violation of the statute is a misdemeanor and is grounds for a civil action by a person wrongfully denied notification. A person is not liable "if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bona fide and true or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so." N.H. RSA 132:27.

On November 17, 2003, plaintiffs-appellees Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. filed a complaint pursuant to 42 U.S.C. § 1983 seeking a declaratory judgment that the Act is unconstitutional and a preliminary injunction to prevent its enforcement once it became effective.

In an order dated December 29, 2003, the United States District Court for the District of New Hampshire (DiClerico, J.), declared the Act unconstitutional and enjoined the Attorney General, and those acting pursuant to and under his direction and authority from enforcing the Act.

The District Court found unconstitutional both the lack of an explicit health exception to protect the health of the pregnant minor, and the narrowness of the Act's exception for abortions necessary to prevent the minor's death. The district court declined to rule on the constitutionality of the confidentiality provisions contained in the Act.

The Attorney General appealed the District Court's decision to the United States Court of Appeals for the First Circuit.

The First Circuit affirmed the district court, finding that in deciding whether the Act regulating abortion such as the Parental Notification Prior to Abortion Act is facially invalid, the undue burden standard set forth in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) should apply as opposed to the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987).

In applying the undue burden standard, the First Circuit determined that because the Act contains no explicit health exception, and because no health exception is implied by other provisions of New Hampshire law or by the Act's judicial bypass procedure, the Act is facially unconstitutional.

The First Circuit also determined that because the death exception contained in the Act was drawn too narrowly and because the Act fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk against criminal and civil liability, the Act was unconstitutional.

Because the First Circuit found the Act in its entirety unconstitutional on the aforementioned grounds, it declined to address whether the confidentiality provisions contained in the Act are constitutional.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' Ruling Conflicts With Decisions In Other Circuits

The United States Supreme Court has never explicitly addressed what standard should be applied to determine the facial validity of a statute regulating abortion. A plurality of justices in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) stated that a law which "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" places an unconstitutional "undue burden" on the exercise of her right to choose abortion. Prior to *Casey*, the Supreme Court applied the *Salerno* standard in the abortion context. *See Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990). After *Casey*, the Fifth Circuit, in *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992), held that Carey did not displace *Salerno*'s "no set of circumstances" test for facial challenges to abortion regulation. *See also Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1102-03 (5th Cir. 1997) (declining to reverse *Barnes*). The Fourth Circuit has also indicated that it would apply *Salerno*. *See Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997) ("not[ing] in passing" that a court is bound to apply *Salerno* in abortion context unless the Supreme Court explicitly overrules it); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 164-65 (4th Cir. 2000) (observation in *Manning* was not dicta and that *Salerno* must be applied to show deference to legislators).

Six other circuits have disagreed with the Fourth and Fifth Circuits. *See Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142-43 (3d Cir. 2000) (holding undue burden standard, instead of *Salerno* standard, applies in abortion context after *Casey*); *Planned Parenthood of*

S. Ariz. v. Lawall, 180 F.3d 1022, 1025-26 (9th Cir. 1999) (same), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999); *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187, 193-96 (6th Cir. 1997) (same), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (same), *cert. denied sub nom.*; *Leavitt v. Jane L.*, 520 U.S. 1274 (1999); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995) (same), *cert. denied sub nom.*; *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996); *A Woman's Choice – E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (same), *cert. denied*, 537 U.S. 1192 (2003).

The question of what is the standard for a challenge to the facial constitutionality of an abortion law is squarely presented. The procedural posture and facts of this case make it an excellent vehicle for this Court to settle the important question of law which has to date evaded review, and which will continue to divide the lower courts until such time as the Supreme Court decides the matter.

This Case Presents Important Issues of Constitutional Law Which Should Be Settled By This Court

The question of whether a statute regulating abortion must contain an explicit health exception has not been addressed by this Court. The New Hampshire Act does not preclude a woman from receiving a medically necessary abortion. While the Act itself does not contain an explicit health exception, other provisions of New Hampshire law provide a functional equivalent.

Moreover, the judicial bypass provision contained in the Act allows a court to act in the best interests of the

minor. This certainly encompasses situations where the health of the minor is at issue. The judicial bypass procedure would allow a minor to seek an abortion needed for health reasons without notifying her parents or guardians.

For similar reasons, the death exception contained in the Act is constitutional. Certainly, if an abortion is necessary to prevent the death of a minor, the minor's health is affected. Thus, for the same reasons that an explicit health exception is not required, the death exception in the Act is constitutional.

The statute at issue here is very similar to the one at issue in *Hodgson v. Minnesota*, 497 U.S. 417 (1990). The statute in that case did not contain an explicit health exception and this Court upheld it. The issue of what impact the parental notification statute had on the health of minors in need of an abortion was discussed in the briefs of that case. This Court did not address the issue that a judicial bypass would be constitutionally necessary in the absence of a health exception. This Court upheld a parental notification statute in *Hodgson* that contained no health exception.

The question posed in this case is an important issue of constitutional concern which has escaped Supreme Court review, and which is presented in a procedural setting which invites appellate review. For this reason, this Court should grant the petition.

CONCLUSION

For all the foregoing reasons, this case warrants the exercise of this Court's *certiorari* jurisdiction. The petition for Writ of *Certiorari* should therefore be granted by this Court.

Respectfully submitted,

KELLY A. AYOTTE
Attorney General

By her attorneys,

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390 F.3d 53

United States Court of Appeals,
First Circuit.
PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, et al., Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.,
Plaintiffs, Appellees,

v.

Peter HEED, Attorney General of the State of New Hampshire, in his Official Capacity, Defendant, Appellant.
No. 04-1161.

Heard Aug. 6, 2004.
Decided Nov. 24, 2004.

Daniel J. Mullen, Associate Attorney General, with whom Suzanne M. Gorman, Senior Assistant Attorney General, and Andrew B. Livernois, Assistant Attorney General, were on brief, for appellant.

Teresa Stanton Collett, Professor of Law University of St. Thomas School of Law, Minneapolis, MN, was on brief, for amici curia New Hampshire Legislators in support of appellant.

Dara Klassel, with whom Martin P. Honigberg, Sulloway & Hollis, PLLC, Jennifer Dalven, Corinne Schiff, Lawrence A. Vogelman, and Shuchman, Krause & Vogelman, PLLC, were on brief, for appellees.

Before BOUDIN, Chief Judge, TORRUELLA, Circuit Judge, and SARIS,* District Judge.

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* Of the District of Massachusetts, sitting by designation.

TORRUELLA, Circuit Judge.

Defendant-appellant Attorney General of the State of New Hampshire, Peter Heed, acting in his official capacity ("Attorney General"), appeals the district court's order declaring unconstitutional and enjoining the enforcement of the Parental Notification Prior to Abortion Act (the "Act"), 2003 N.H. Laws 173, codified at N.H.Rev.Stat. Ann. ("RSA") § 132:24-28 (2003).

I. *Background*

In June 2003, the New Hampshire legislature passed "AN ACT requiring parental notification before abortions may be performed on unemancipated minors," which states that:

> No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

RSA 132:25, I.[1] Paragraph II specifies that "written notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the

[1] The Act defines an abortion as:

> the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage. RSA 132:24, I.

parent by the physician or an agent." RSA 132:25, II. Paragraph III allows for notification by certified mail with return receipt requested and with restricted delivery to the addressee. RSA 132:25, III.

> The notice requirement is waived if
>
> (a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide required notice; or
>
> (b) The person or persons who are entitled to notice certify in writing that they have been notified.

RSA 132:26, I.

If a minor does not want her parent or guardian notified, she may request a state judge, after a hearing, to "authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion," or if the judge determines that "the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests." RSA 132:26, II. In these proceedings, the pregnant minor may act on her own behalf or be appointed a guardian ad litem, and she must also be advised that she has a right to request court-appointed counsel. RSA 132:26, II(a). The court proceedings "shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor." RSA 132:26, II(b). Specifically, "[i]n no case shall the court fail to rule within 7 calendar days from the time the petition is

filed." RSA 132:26, II(b). The judge must also "make in writing specific factual findings and legal conclusions," and order a record of the evidence to be maintained. RSA 132:26, II(b).

If the minor's petition is denied, an "expedited confidential appeal shall be available," and the appellate court must rule within seven calendar days of the docketing of the appeal. Access to the trial and appellate courts for the purposes of these petitions "shall be afforded such a pregnant minor 24 hours a day, 7 days a week." RSA 132:26, II(c).

Violation of the Act can result in criminal penalties and civil liability:

> Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bona fide and true, or if the person has attempted by reasonable diligence to deliver notice, but has been unable to do so.

RSA 132:27. The Act was to take effect on December 31, 2003. 2003 N.H. Laws 173.

On November 17, 2003, plaintiffs-appellees Planned Parenthood of Northern New England, Concord Feminist Health Center of Portsmouth, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. ("plaintiffs") filed a

complaint under 42 U.S.C. § 1983, seeking a declaratory judgment that the Act is unconstitutional and a preliminary injunction to prevent its enforcement once it became effective.[2] The district court merged the preliminary and permanent injunction proceedings and, on December 29,

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[2] Citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), amici New Hampshire Legislators argue that appellee abortion providers lack standing to challenge the Act because the injury giving rise to standing is speculative. The injury in question, according to amici, is the one suffered by pregnant minors who require an abortion for health reasons. Amici argue that it is "not sufficient to merely show that some unknown medical conditions exist that may at some unknown future date be suffered by some unknown minors." Brief of Amici New Hampshire Legislators at 8. In fact, Dr. Wayne Goldner listed in his unopposed declaration five specific conditions that could require abortion to protect a minor's health: preeclampsia, eclampsia, premature rupture of the membranes surrounding the fetus, spontaneous chorioamnionitis, and heavy bleeding during pregnancy. Declaration of Wayne Goldner, M.D., ¶¶ 8-15. Moreover, appellee abortion providers themselves face an imminent injury – civil or criminal prosecution for performing an abortion in violation of the Act – sufficient to confer on them Article III standing. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (holding that physician abortion providers asserting their own rights and those of their patients had standing to challenge abortion regulation and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"). Because of their close relationship to the abortion decision, and the rights involved, providers routinely have *jus tertii* standing to assert the rights of women whose access to abortion is restricted. *See Singleton v. Wulff*, 428 U.S. 106, 117, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) ("[I]t generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decisions. . . . "). Indeed, as the Ninth Circuit has noted, "physicians and clinics performing abortions are routinely recognized as having standing to bring broad facial challenges to abortion statutes." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 916-18 (9th Cir.2004) (discussing abortion providers' third-party standing and citing cases).

2003, issued an order holding the Act unconstitutional and permanently enjoining its enforcement.

The district court found unconstitutional both (1) the lack of an explicit exception to protect the health of the pregnant minor, and (2) the narrowness of the Act's exception for abortions necessary to prevent the minor's death. Having found the Act fatally flawed in these respects, the district court declined to rule on the constitutionality of the Act's failure to provide specific protections for the confidentiality of a minor seeking a judicial waiver.

The Attorney General, acting in his official capacity, appeals.

II. *Analysis*

We review the district court's decision regarding the constitutionality of a statute *de novo*. *United States v. Lewko*, 269 F.3d 64, 67 (1st Cir.2001).

The Attorney General argues that in deciding whether the Act is facially invalid we should apply the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).[3] This standard requires plaintiffs challenging a state law as facially invalid to show that "no set of circumstances exists under which the Act would be valid." *Id.* at 745, 107 S.Ct. 2095. The Attorney General's argument

[3] In *Salerno*, the Court considered a facial challenge to the Bail Reform Act, 18 U.S.C. § 3142(e), which permits pretrial detention on the ground of dangerousness. The Court held that the provision in question, which was accompanied by strict procedural safeguards, did not constitute a facial violation of the Due Process or Excessive Bail clauses of the Constitution. *Salerno*, 481 U.S. at 755, 107 S.Ct. 2095.

rests on the premise that the *Salerno* standard is applicable to the Act despite the agreement of a plurality of Justices in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 876-77, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), that a law which "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" places an unconstitutional "undue burden" on the exercise of her right to choose abortion. A majority of the *Casey* Court applied that standard to determine that an abortion regulation is facially invalid if "in a large fraction of cases in which [the regulation] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," thus imposing an "undue burden." *Id.* at 895, 112 S.Ct. 2791 (per Justices O'Connor, Kennedy, and Souter, joined by Justices Stevens and Blackmun). The Court has since confirmed that "'a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional." *Stenberg v. Carhart*, 530 U.S. 914, 921, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (quoting *Casey*, 505 U.S. at 877, 112 S.Ct. 2791); *see also id.* at 945-46, 112 S.Ct. 2791 (declaring Nebraska ban on so-called "partial birth abortion" unconstitutional under undue burden standard).

Despite the Supreme Court's clear application of the undue burden standard in *Casey* and *Stenberg*, it has never explicitly addressed the standard's tension with *Salerno*. In the instant case, while recognizing that this court has yet to address the issue, the district court followed the majority of circuits that apply the *Casey* and *Stenberg* standard to legislation regulating abortion. The Attorney General notes that the Supreme Court applied the *Salerno* standard in the abortion context prior to

Casey, see, e.g., Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990), and urges us to follow the Fifth Circuit's decision in *Barnes v. Moore,* 970 F.2d 12, 14 n. 2 (5th Cir.1992), that *Casey* does not displace *Salerno's* "no set of circumstances" test for facial challenges to abortion regulation. *See also Causeway Med. Suite v. Ieyoub,* 109 F.3d 1096, 1102-03 (5th Cir.1997) (declining to reverse *Barnes*). The overwhelming majority of circuits to address this issue, however, have disagreed with the Fifth Circuit.[4] *See, e.g., Planned Parenthood of Cent. N.J. v. Farmer,* 220 F.3d 127, 142-43 (3d Cir.2000) (holding undue burden standard, instead of *Salerno* standard, applies in abortion context after *Casey*); *Planned Parenthood of S. Ariz. v. Lawall,* 180 F.3d 1022, 1025-26 (9th Cir.1999) (noting inconsistency between *Casey* and *Salerno,* and following "great weight of circuit authority holding that *Casey* has overruled *Salerno* in the context of facial challenges to abortion statutes"), *amended on denial of reh'g,* 193 F.3d 1042 (9th Cir.1999); *Women's Med. Prof. Corp. v. Voinovich,* 130 F.3d 187, 193-96 (6th Cir.1997) (holding that *Casey* effectively overruled *Salerno*), *cert. denied,* 523 U.S. 1036, 118 S.Ct. 1347, 140 L.Ed.2d 496 (1998); *Jane L. v. Bangerter,* 102 F.3d 1112, 1116 (10th

[4] Only the Fourth Circuit has been sympathetic to the *Barnes* approach, indicating that it might continue to apply *Salerno. See Manning v. Hunt,* 119 F.3d 254, 268 n. 4 (4th Cir.1997) ("not[ing] in passing" that a court is bound to apply *Salerno* in abortion context unless the Supreme Court explicitly overrules it); *Greenville Women's Clinic v. Bryant,* 222 F.3d 157, 164-65 (4th Cir.2000) (noting that observation in *Manning* was not dicta and that *Salerno* must be applied to show deference to legislatures). *But see, Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health,* 317 F.3d 357, 359 (4th Cir.2002) (on subsequent appeal, characterizing *Bryant* as holding, in part, that regulation in question "did not place an *undue burden* on a woman's decision whether to seek an abortion") (emphasis added).

Cir.1996) (observing that Supreme Court applied undue burden test instead of *Salerno* test in *Casey,* rendering undue burden "the proper test after *Casey*"), *cert. denied sub nom., Leavitt v. Jane L.,* 520 U.S. 1274, 117 S.Ct. 2453, 138 L.Ed.2d 211 (1997); *Planned Parenthood, Sioux Falls Clinic v. Miller,* 63 F.3d 1452, 1456-58 (8th Cir.1995) (opting to "follow what the Supreme Court actually did – rather than what it failed to say – and apply the undue-burden test."), *cert. denied sub nom., Janklow v. Planned Parenthood,* 517 U.S. 1174, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996); *cf. A Woman's Choice-E. Side Women's Clinic v. Newman,* 305 F.3d 684, 687 (7th Cir.2002) (reconciling conflict between *Salerno,* and *Stenberg/Casey,* by construing "no set of circumstances" language as a "suggestion" that gives way to *Stenberg's* holding that undue burden test applies), *cert. denied,* 537 U.S. 1192, 123 S.Ct. 1273, 154 L.Ed.2d 1026 (2003). We agree with these six circuit courts that the undue burden standard – proposed as a standard "of general application" by the *Casey* plurality, *Casey,* 505 U.S. at 876, 112 S.Ct. 2791, and twice applied to abortion regulations by a majority of the Court, *id.* at 895, 112 S.Ct. 2791; *Stenberg,* 530 U.S. at 920, 120 S.Ct. 2597 – supersedes *Salerno* in the context of abortion regulation.

Complementing the general undue burden standard, the Supreme Court has also identified a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of a pregnant woman's health. *See Stenberg,* 530 U.S. at 929-30, 120 S.Ct. 2597 (identifying "two independent reasons" for striking down a Nebraska regulation: first, that it lacks a health exception, and second, that it imposes an undue burden on a woman's ability to choose

abortion). The origin of the health requirement can be traced to *Roe,* which held that "the State, in promoting its interest in the potentiality of human life, may . . . regulate . . . abortion [after fetal viability] *except* where necessary, in appropriate medical judgment, for the preservation of the life *or health* of the mother." *Roe v. Wade,* 410 U.S. 113, 164-65, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (emphasis added), *reaff'd Casey,* 505 U.S. at 879, 112 S.Ct. 2791 (plurality opinion). Later, the majority in *Casey* observed that, had the medical emergency exception to Pennsylvania's abortion restrictions – among them a parental consent requirement – precluded "immediate abortion despite some significant health risks," it would have been unconstitutional since "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion . . . if continuing her pregnancy would constitute a threat to her health." *Casey,* 505 U.S. at 880, 112 S.Ct. 2791. Finally, in *Stenberg,* 530 U.S. at 930, 120 S.Ct. 2597, the Supreme Court clarified that "the law requires a health exception in order to validate even a post viability abortion regulation, [and] it at a minimum requires the same in respect to previability regulations," 530 U.S. at 930, 120 S.Ct. 2597. Thus, a statute regulating abortion must contain a health exception in order to survive constitutional challenge. Similarly, *Roe* requires that abortion regulations contain an adequate death exception to permit abortion when it is necessary to save the life of a pregnant woman. *Roe,* 410 U.S. at 164-65, 93 S.Ct. 705.

The instant case thus presents three questions: whether New Hampshire's Act contains an adequate health exception, whether it contains an adequate death exception, and whether it places an undue burden on unemancipated minors who wish to obtain an abortion. A

state's decision to require parental notification for minors seeking an abortion is not constitutionally infirm *per se. See Lambert v. Wicklund,* 520 U.S. 292, 117 S.Ct. 1169, 137 L.Ed.2d 464 (1997) (upholding parental notification statute against constitutional challenge to judicial bypass procedure). The district court determined, however, that the New Hampshire Act's lack of a health exception and overly narrow death exception render it unconstitutional. Appellees argue that the Act also creates an undue burden by failing to adequately ensure the confidentiality of judicial bypass procedures.

A. *Health exception*

The Attorney General and amici suggest that parental notification laws are shielded from the health exception requirement reiterated in *Stenberg* on account of the interests they aim to protect.[5] Parental notification laws are enacted not only in furtherance of the state's "interest in the potentiality of human life," *Roe,* 410 U.S. at 164, 93

[5] Amicus Bishop of Manchester argues that *Stenberg* should be limited to cases in which a particular method of abortion is banned outright. This argument misreads the Court's discussion of the regulation at issue in that case. The majority did emphasize its prior caselaw "invalidat[ing] statutes that in the process of regulating the *methods* of abortion, impose[ ] significant health risks," 530 U.S. at 931, 120 S.Ct. 2597 (emphasis in original), but this language was meant to rebut Justice Thomas's dissent that a health exception was only applicable "where the pregnancy *itself* creates a threat to health." *Id.* (emphasis in original). To the contrary, the Court held, "a risk to a woman's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely." *Id.* The risk is also the same when it arises from a minor's inability or unwillingness to notify her parents. The need for a health exception arises from the potential for risk to a woman's health, not from the source of that risk.

S.Ct. 705, but also in the interest of protecting minors from undertaking the risks of abortion without the advice and support of a parent. In considering an abortion regulation based on interests other than the one identified in *Roe,* however, the Supreme Court has determined that it "cannot see how the interest-related differences could make any difference to the . . . application of the 'health' requirement." *Stenberg,* 530 U.S. at 931, 120 S.Ct. 2597; *see also Casey,* 505 U.S. at 877, 112 S.Ct. 2791 ("[A] statute which, while furthering the interest in potential life *or some other valid state interest,* has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." (emphasis added)) (plurality opinion). The Constitution requires a health exception even when the State's interest in regulation is "compelling." *See Roe,* 410 U.S. at 163, 93 S.Ct. 705; *see also Stenberg,* 530 U.S. at 931, 120 S.Ct. 2597 ("[A] State may promote but not endanger a woman's health when it regulates the methods of abortion."). Thus, regardless of the interests served by New Hampshire's parental notice statute, it does not escape the Constitution's requirement of a health exception.

The Attorney General and amici also argue that our decision should be controlled by *Hodgson v. Minnesota,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), in which the Supreme Court upheld a parental notification statute that contained no health exception. However, as noted by the district court, the *Hodgson* Court did not consider a challenge to that statute's lack of a health

exception,[6] and even if it had, the subsequent decisions in *Casey* and *Stenberg* would nevertheless require a health exception in the instant case. The additional cases cited by the Attorney General and amici as examples of parental notification or consent statutes upheld without a health exception are all similarly distinguishable. Only three times since *Roe* has the Supreme Court addressed a clear challenge to an abortion regulation's lack of a health exception. In all three, the Court has indicated that an exception must be provided when the restriction would place a woman's health at risk. *See Stenberg,* 530 U.S. at 930-38, 120 S.Ct. 2597 (requiring health exception for "partial-birth abortion" ban); *Casey,* 505 U.S. at 879-80,

[6] A review of the *Hodgson* briefs indicates only one instance in which the impact of the parental notification statute on minors in need of an abortion for health reasons is discussed. In response to Minnesota's cross-petition to appeal the Eighth Circuit's determination that a two-parent notice requirement was unconstitutional in the absence of a judicial bypass, Cross-Respondents discussed the lengths to which some minors would go to avoid having to notify a parent. This might include delaying or foregoing abortion even when "serious health problems . . . necessitate an immediate abortion." Brief for Cross-Respondents at 15, *Minnesota v. Hodgson,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (No. 88-1309). Such health problems, Cross-Respondents explained, were not covered by the statute's death exception. *Id.* at 15 n. 29. There was no argument that the notice requirement was unconstitutional because it lacked a health exception for such circumstances; rather, Cross-Respondents argued that a judicial bypass provision was constitutionally required, in part so that a minor would not feel compelled to forego an abortion needed for health reasons in order to avoid notifying her parents. Cross-Petitioners responded that no evidence had been provided of circumstances in which health problems short of a threat to a minor's life would necessitate abortion. Reply Brief of Cross-Petitioners at 17-18, *Minnesota v. Hodgson,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (No. 88-1309). The Supreme Court addressed neither argument, although a majority did find the two-parent notice requirement unconstitutional in the absence of judicial bypass. *Hodgson,* 497 U.S. at 455, 110 S.Ct. 2926.

112 S.Ct. 2791 (reading medical emergency exception to include threat to health); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists,* 476 U.S. 747, 768-71, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (finding statute requiring presence of second physician for post-viability abortion facially invalid for lack of medical emergency exception), *overruled* on other grounds, *Casey,* 505 U.S. at 882, 112 S.Ct. 2791.

Since *Stenberg,* at least two circuit courts have applied the health exception requirement to parental notice or consent laws. In *Planned Parenthood of the Rocky Mountains Services, Corp. v. Owens,* 287 F.3d 910, 915-16 (10th Cir.2002), the Tenth Circuit held that, because circumstances existed in which a pregnancy complication could seriously threaten a pregnant minor's health, a Colorado parental notification law similar to the New Hampshire Act was facially invalid for lack of a health exception. Similarly, the Ninth Circuit recently struck down an Idaho parental consent statute, finding that "[a] health exception is as requisite in statutory or regulatory provisions affecting only minors' access to abortion as it is in regulations concerning adult women." *Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 922-24 (9th Cir.2004) (finding Idaho statute's health exception overly narrow). We agree, and therefore affirm the district court's holding that the New Hampshire Act is constitutionally invalid in the absence of a health exception.

Acknowledging that the Act contains no explicit health exception, the Attorney General argues that other provisions of New Hampshire law provide a functional equivalent. None of the proffered statutes, however, is adequate. RSA 153-A:18 precludes civil liability for health professionals who render emergency medical care without

consent, but it does not preclude criminal liability. RSA 676:6, VII(b) permits physicians and their assistants to use force in providing emergency medical care when no one competent to consent to such care is available. While RSA 676:6, VII(b) may preclude criminal liability for assault, it would not insulate a physician from criminal liability for violating the Act's notification provisions. *See* RSA 132:27 (providing that violation of the Act's notice requirement is a misdemeanor). Moreover, the proffered statutes insulate medical personnel from civil liability or assault charges that arise from giving treatment without *consent;* they do not provide such protection when the legal action arises from giving treatment to a consenting minor without first providing forty-eight hours' notice to her parent.

For the first time, in this appeal, the Attorney General also cites RSA 627:3, I, which codifies the "competing harms" defense to criminal liability for those who violate the law in order to avoid harm that "outweigh[s], according to ordinary standards of reasonableness, the harm sought to be prevented" by the criminal provision. Although this provision has the potential to protect against criminal liability under the Act, it cannot preclude civil liability. Moreover, the provision would leave providers uncertain whether, in any given circumstance, providing an abortion in violation of the Act would meet the "ordinary standards of reasonableness."

Even if these statutes could be cobbled together to preclude all civil and criminal liability for medical personnel who violate the Act's notice requirements in order to preserve a minor's health, we would not view them as equivalent to the constitutionally required health exception. The basic canons of statutory construction in New

Hampshire require us to look first to a statute's plain meaning, and when it is clear and unambiguous, to apply the statute as written. *See, e.g., Appeal of Astro Spectacular, Inc.*, 138 N.H. 298, 639 A.2d 249, 250 (N.H.1996). The Act clearly states that "[n]o abortion shall be performed upon an unemancipated minor . . . until at least 48 hours after written notice" to a parent. RSA 132:25. Three explicit exceptions to this rule are provided: (1) when abortion is necessary to prevent the minor's death; (2) when a parent certifies in writing that he or she has been notified; and (3) when a court grants a judicial bypass. RSA 132:26, I, II. The New Hampshire legislature's intent that abortions not in compliance with the Act's notification provisions be prohibited in all but these three circumstances is clear. *See St. Joseph Hosp. of Nashua v. Rizzo*, 141 N.H. 9, 676 A.2d 98, 100 (1996) (espousing *expressio unius* standard of statutory construction). The earlier-enacted statutory provisions cited by the Attorney General cannot be read to supercede this intent. *See Petition of Dunlap*, 134 N.H. 533, 604 A.2d 945, 955 (1992) (" 'When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats the subject in a general fashion.' ") (quoting *Bd. of Selectmen v. Planning Bd.*, 118 N.H. 150, 383 A.2d 1122, 1124 (1978)).

Finally, the Attorney General argues that the Act's judicial bypass mechanism allows prompt authorization of a health-related abortion without notice. The Act provides that such proceedings "shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay," provides minors 24-hour, 7-day access to the courts, and provides for expedited

appeal. RSA 132:26, II(b)-(c). However, the Act allows courts seven calendar days in which to rule on minors' petitions, and another seven calendar days on appeal. Delays of up to two weeks can therefore occur, during which time a minor's health may be adversely affected. Even when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk. Due to this delay, the Act's bypass provision does not stand in for the constitutionally required health exception. *See Thornburgh*, 476 U.S. at 768-71, 106 S.Ct. 2169 (finding statute facially invalid for failing to provide health exception to delay caused by awaiting presence of second physician).

The New Hampshire Act contains no explicit health exception, and no health exception is implied by other provisions of New Hampshire law or by the Act's judicial bypass procedure. Thus, the Act is facially unconstitutional.

B. *Death exception*

Just as it requires a health exception, the Constitution also requires an exception to abortion restrictions when the life of a pregnant woman is in danger. *Stenberg*, 530 U.S. at 931, 120 S.Ct. 2597 ("[T]he governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.' " (quoting *Casey*, 505 U.S. at 879, 112 S.Ct. 2791)). Accordingly, the New Hampshire Act waives its parental notice requirement when a physician can certify that abortion is "necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26, I(a). Appellees argue that this death

exception is unconstitutionally narrow because (1) it is not possible for a physician to determine with any certainty whether death will occur before the notice provisions could be complied with; (2) it does not allow for circumstances in which abortion is the best, but not the only, option for saving a minor's life;[7] and (3) it does not permit abortion providers to rely on their own good faith judgment about whether an abortion is necessary. The Attorney General does not refute these charges, but responds that the Act is sufficiently specific to give notice of prohibited conduct, and that a scienter requirement can be read into the Act from New Hampshire law.

A minimum of forty-eight hours is necessary for compliance with the Act's notification requirement. RSA 132:25, I. Dr. Wayne Goldner, a named plaintiff in this case, provided unopposed testimony that physicians cannot predict with adequate precision what course medical complications will take, and thus cannot always determine whether death will occur within this time window. Consequently, the time component of the Act's death exception forces physicians either to gamble with their patients' lives in hopes of complying with the notice

[7] The plaintiffs correctly identify that the Act, as currently formulated, would require a physician to use procedures that pose more risk to her patient's health in order to comply with the necessity provision of the death exception. *See Colautti v. Franklin,* 439 U.S. 379, 400, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) ("[T]he word 'necessary' suggests that a particular technique must be indispensable to the woman's life or health – not merely desirable – before it may be adopted."). Because we have already found unconstitutional the Act's failure to provide a health exception – which would remedy this problem by permitting abortion even in cases where a minor's death could be avoided by other, riskier means – we do not address this flaw as a separate ground for constitutional challenge.

requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice. *See* Declaration of Wayne Goldner, M.D., at ¶ 17 ("[T]he Act will force me to choose between following the law and letting my patient's condition deteriorate, possibly past the point of being able to save her life at all, and alternatively providing appropriate medical care to my patient and risking criminal prosecution and being sued by her parents."). The threat of such sanctions will have a "profound chilling effect on the willingness of physicians to perform abortions" when a minor's life is at risk. *Colautti,* 439 U.S. at 396, 99 S.Ct. 675. Thus, the Act's death exception is drawn too narrowly to protect minors in need of a life-saving abortion.

The Attorney General apparently concedes that an abortion provider must be able to rely on his or her good faith medical judgment in determining whether her patient's life is in danger. *See Colautti,* 439 U.S. at 395, 99 S.Ct. 675 ("We need not now decide whether, under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability. We reaffirm, however, that 'the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.' "). The Attorney General argues that RSA 626:2, I, which states that "[a] person is guilty of a . . . misdemeanor only if he acts purposely, knowingly, recklessly or negligently, as the law may require, with respect to each element of the offense," can be read together with the Act to provide the necessary scienter requirement. According to the Supreme Court of New Hampshire, "[w]here a specific mental state is not provided for the

offense," RSA 626:2, I(a) requires "proof of a culpable mental state which is appropriate in light of the nature of the offense and the policy considerations for punishing the conduct in question." *State v. Bergen,* 141 N.H. 61, 677 A.2d 145, 146 (1996) (determining requisite mental state for indecent exposure). It is not clear, however, which of the four scienter requirements would be imposed in this circumstance. The definition of negligence imposes an objective reasonableness standard, *see* RSA 626:2, II(d), thus, a physician who acts on a good faith belief that abortion is necessary to save a patient's life could nonetheless face criminal or civil liability if a judge or jury later found that the physician's assessment was unreasonable. *See Voinovich,* 130 F.3d at 205 ("In this area [of medical necessity] where there is such disagreement, it is unlikely that the prosecution could not find a physician willing to testify that the physician did not act reasonably.").

As the district court held, we cannot construe the Act to preclude liability for good faith judgments "unless such a construction is reasonable and readily apparent." *Heed,* 296 F.Supp.2d at 66-67 (quoting *Stenberg,* 530 U.S. at 944, 120 S.Ct. 2597). The Act gives no indication that the negligence standard set out in RSA 626:2, I should not be applied. Thus, a physician cannot know whether his or her determination that a minor's life is at risk will be judged according to a standard (e.g., knowingly) that respects her good-faith medical assessment, or by an objective standard (negligently) that would leave the physician's judgment open to *post hoc* second guessing. The resulting uncertainty would, again, impermissibly chill physicians' willingness and ability to provide lifesaving abortions. *See Voinovich,* 130 F.3d at 205 (finding medical emergency exception unconstitutionally vague "because physicians

cannot know the standard under which their conduct will ultimately be judged"). As Dr. Goldner explained, "the Act forces doctors to think about criminal prosecution at a time when we need to be concentrating on doing what is best for our patients, thus creating unnecessary risk to patients' health and lives." Declaration of Wayne Goldner, M.D., at ¶ 19. That risk constitutes an undue burden for minors in need of life-saving abortions.

Because its time requirement is drawn too narrowly, and because it fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk against criminal and civil liability, the Act's death exception is unconstitutional.

C. *Confidentiality*

The Act provides for judicial bypass of its notice provisions if, after a hearing, a judge "determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion," or, if she is not capable of giving informed consent, that "the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests." RSA 132:26, II; *cf. Bellotti v. Baird,* 443 U.S. 622, 643-44, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (requiring parental consent laws to provide for judicial bypass on same grounds). Appellees argue that the Act does not adequately provide for the confidentiality of these judicial bypass procedures. The Act indicates that "[p]roceedings in the court . . . shall be confidential," and "[a]n expedited confidential appeal shall be available." RSA 132:26, II(b)-(c).

Inadequate confidentiality provisions "raise the specter of public exposure and harassment of women who

choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy." *Thornburgh*, 476 U.S. at 767, 106 S.Ct. 2169; *see also Bellotti v. Baird*, 443 U.S. 622, 644, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (finding that judicial bypass proceeding "must assure that a resolution of the issue, and any appeals that follow, will be completed with anonymity"). In the instant case, a lack of confidentiality would also create a significant risk that a minor's parents could learn of her pregnancy and desire for an abortion, resulting in the very harms sought to be avoided by the bypass procedure. Alternatively, a minor might be compelled to delay or decline to seek an abortion out of fear that her parents would find out. Thus, for a large fraction of minors eligible for judicial bypass, inadequate confidentiality would impose an undue burden.

Confidentiality provisions must "take reasonable steps to prevent the public from learning of the minor's identity," but the Supreme Court has "refuse[d] to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees." *Akron Ctr.*, 497 U.S. at 513, 110 S.Ct. 2972. Considerable grey area is left between these two standards. Because we have already found the Act in its entirety unconstitutional on other grounds, however, we find it unnecessary to delve further into an evaluation of its confidentiality provisions.

III. *Conclusion*

For the reasons stated above, we affirm the district court's order declaring the Act unconstitutional and enjoining its enforcement.

Affirmed.

296 F.Supp.2d 59

United States District Court,
D. New Hampshire.
PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.,

v.

Peter HEED, Attorney General of New Hampshire
No. CIV. 03-491-JD.

Dec. 29, 2003.

Dara Klassel, Planned Parenthood Federation of America, Inc., Jennifer Dalven, American Civil Liberties Union Foundation, New York City, Martin P. Honigberg, Sulloway & Hollis, Concord, NH, Lawrence A. Vogelman, Shuchman Krause & Vogelman, Exeter, NH, for Plaintiffs.

Daniel J. Mullen, NH Attorney General's Office, Concord, NH, for Defendant.

ORDER

DICLERICO, District Judge.

The plaintiffs bring an action pursuant to 42 U.S.C. § 1983, seeking to have the Parental Notification Prior to Abortion Act ("Act"),[1] passed by the New Hampshire legislature, declared unconstitutional. The plaintiffs also seek an injunction to prevent enforcement of the Act. The Attorney General contends that the Act is constitutional and objects to an injunction.

[1] 2003 N.H. Laws ch. 173, effective date, December 31, 2003, to be codified at N.H.Rev.Stat. Ann. ("RSA") § 132:24-:28.

At the plaintiff's request, this case has been given expedited consideration by the court in view of the fact that the Act is due to become effective on December 31, 2003.

After carefully reviewing the provisions of the Act and the applicable United States Supreme Court precedents, the court has concluded that the Act fails to meet the constitutional requirements as determined by the United States Supreme Court. Therefore, the Act cannot be enforced.

Background

In June of 2003, the New Hampshire Senate and House of Representatives passed "AN ACT requiring parental notification before abortions may be performed on unemancipated minors." The Act defines "abortion" as:

> the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

RSA 132:24, I (eff.12/31/03). The central provision of the Act is a prohibition on abortion in the absence of parental notification:

> No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency,

> until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

RSA 132:25, I. Paragraph II requires written notice to be addressed to the parent at the parent's "usual place of abode" and to be "delivered personally by the physician or an agent." Paragraph III provides an alternative to allow notice by certified mail, return receipt requested, with delivery restricted to the addressee.

Notice is not required if the physician "certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice; or [ ][t]he person or persons who are entitled to notice certify in writing that they have been notified." RSA 132:26,I. If the pregnant minor does not want to notify a parent, she may, alternatively, seek court authorization for the abortion. RSA 132:26, II. In that case, the court is required to hold a hearing and then determine whether "the pregnant minor is mature and capable of giving informed consent to the proposed abortion" or "whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests." *Id.* Such court proceedings "shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant minor." RSA 132:26,II(b).

Violation of the Act carries penalties. "Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification." RSA 132:27. Liability may be avoided if the person who performed the

abortion can establish "by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding the information necessary to comply with this section are bone [sic] fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so." *Id.*

The plaintiffs simultaneously filed their complaint and a motion for a preliminary injunction to prevent the Act from being enforced once it becomes effective on December 31, 2003. The Attorney General filed an objection, and the plaintiffs filed a reply. No surreply was filed. The parties have agreed that the court may decide the plaintiffs' requests for a declaratory judgment and permanent injunctive relief on the merits based on their present filings.

Discussion

The plaintiffs contend that the Act is unconstitutional because it lacks an exception to the parental notice requirement in circumstances when the delay would threaten the health of the pregnant minor. They also contend that the Act's exception to prevent death is unconstitutionally narrow and that the confidentiality requirement for court proceedings is insufficient. The Attorney General argues that a health exception is not constitutionally required in a parental notification law, that either the judicial bypass or other New Hampshire statutes adequately protect the health of a pregnant minor, that the Act would not be applied to physicians who act in good faith, and that the confidentiality provision is sufficient.

I. *Declaratory Judgment*

Pursuant to 28 U.S.C. § 2201(a), the court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." The plaintiffs seek a declaration that the Act is unconstitutional on its face.

The parties dispute the appropriate standard for evaluating a facial challenge to the validity of a state law regulating abortion. When plaintiffs bring a facial constitutional challenge to state law, they ordinarily must show that "'no set of circumstances exists under which the Act would be valid.'" *Pharm. Res. & Mfrs. of Am. v. Concannon,* 249 F.3d 66, 77 (1st Cir.2001) (quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)), *aff'd sub nom Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003). That high hurdle, however, applies only when the plaintiffs challenge a state law "that does not regulate constitutionally protected conduct." *Donovan v. City of Haverhill,* 311 F.3d 74, 77 (1st Cir.2002).

In *Casey,* the Court considered the facial constitutionality of a Pennsylvania law that imposed conditions on performing abortions for both adult and minor patients and, without mentioning *Salerno,* applied a standard of whether the challenged law imposes an "undue burden" or "will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 874, 877 & 895, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). In *Stenberg v. Carhart,* 530 U.S. 914, 921, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), the Court concluded that a Nebraska abortion statute was unconstitutional, after applying a three level

test, including the "undue burden" standard, also without mentioning *Salerno.*

The First Circuit has not addressed the question of whether the *Salerno* standard applies in the context of abortion legislation.[2] Several other courts have concluded, however, that *Casey* and *Stenberg* provide the governing standard and that the *Salerno* standard does not apply. *See, e.g., A Woman's Choice-East Side Women's Clinic v. Newman,* 305 F.3d 684, 687 (7th Cir.2002), *cert. denied A Woman's Choice-East Side Women's Clinic v. Brizzi,* 537 U.S. 1192, 123 S.Ct. 1273, 154 L.Ed.2d 1026 (2003); *Planned Parenthood of the Rocky Mts. Servs. v. Owens,* 287 F.3d 910, 917 (10th Cir.2002); *Planned Parenthood of Cent. N.J. v. Farmer,* 220 F.3d 127, 142-43 (3d Cir.2000); *Planned Parenthood of Southern Ariz. v. Lawall,* 180 F.3d 1022, 1025-26 (9th Cir.1999), *amended on denial of rehear'g,* 193 F.3d 1042 (9th Cir.1999); *R.I. Med. Soc'y v. Whitehouse,* 66 F.Supp.2d 288, 312-13 (D.R.I.1999) (citing additional cases). The Fourth and Fifth Circuits alone have chosen to apply *Salerno* in the context of abortion legislation. *See Manning v. Hunt,* 119 F.3d 254, 269 (4th Cir.1997) (noting circuit split and citing cases). This court is satisfied that the *Casey* and *Stenberg* standard applies in the context of abortion legislation, as is well documented by a majority of courts that have considered the question. Therefore, that standard will be followed in this case.

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[2] However, having limited *Salerno* to cases that do not involve constitutionally protected conduct, it appears likely that the First Circuit would not apply *Salerno* in cases involving laws restricting access to abortion services. *See Donovan,* 311 F.3d at 77.

The United States Supreme Court decided in 1973 that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade,* 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). In *Roe,* the Supreme Court held that a Texas criminal statute which excepted "only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 164, 93 S.Ct. 705. The Supreme Court has also held that minors, as well as adults, have a constitutional right to choose an abortion. *See Bellotti v. Baird,* 443 U.S. 622, 633, 642, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *Planned Parenthood of Mo. v. Danforth,* 428 U.S. 52, 72-5, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). During the three decades that have passed since *Roe v. Wade,* the Supreme Court and lower federal courts and state courts have continued to address issues arising from the recognition of a woman's constitutional right to decide whether to terminate a pregnancy. *See, e.g., Stenberg,* 530 U.S. at 920, 120 S.Ct. 2597; *Casey,* 505 U.S. at 843-44, 112 S.Ct. 2791; *Owens,* 287 F.3d at 917; *Humphreys v. Clinic for Women, Inc.,* 796 N.E.2d 247 (Ind.2003); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.,* 203 Ariz. 454, 56 P.3d 28 (2002).

The right to choose to terminate a pregnancy may be subject to limitation, the degree of which depends upon the stage of the pregnancy and the state's interest both in the health of the mother and in promoting "the potentiality of

human life." *Roe,* 410 U.S. at 164, 93 S.Ct. 705. "[B]efore 'viability . . . the woman has a right to choose to terminate her pregnancy.'" *Stenberg,* 530 U.S. at 921, 120 S.Ct. 2597 (quoting *Casey,* 505 U.S. at 870, 112 S.Ct. 2791). "'[A] law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional[,] . . . [and][a]n 'undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" *Id.* After viability of the fetus, the state may "'"regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."'" *Id.* (quoting *Casey,* 505 U.S. at 879, 112 S.Ct. 2791, *quoting Roe,* 410 U.S. at 164-65, 93 S.Ct. 705).

The Supreme Court has upheld state laws requiring parental notification prior to performing abortions on minors. *See Lambert v. Wicklund,* 520 U.S. 292, 117 S.Ct. 1169, 137 L.Ed.2d 464 (1997); *Casey,* 505 U.S. at 899, 112 S.Ct. 2791. In *Lambert,* cited by the Attorney General, the Court rejected the plaintiff's argument that the judicial bypass procedure, incorporated in the state law, was deficient because it required a showing that parental notification was not in the minor's best interests rather than a showing that an abortion without notification was in her best interest. 520 U.S. at 294, 117 S.Ct. 1169. However, the *Lambert* Court did not consider the issues that have been raised in this case.

A. Health Exception

In *Casey,* the Supreme Court considered five provisions of Pennsylvania law pertaining to abortion. 505 U.S. at 844, 112 S.Ct. 2791. One of those provisions required a minor to obtain the informed consent of a parent before the procedure but also provided a judicial bypass option and an exception for a medical emergency. *Id.* The plaintiffs challenged the consent provision on the single ground that it required informed parental consent. *Id.* Given the limited challenge and the judicial bypass and emergency exceptions to the consent requirement, the Court concluded that the provision passed constitutional muster. *Id.* at 899, 112 S.Ct. 2791.

The Supreme Court later reiterated and clarified *Casey,* a plurality opinion, in *Stenberg,* stating that "the governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.'"[3] *Stenberg,* 530 U.S. at 931, 120 S.Ct. 2597 (quoting *Casey,* 505 U.S. at 879, 112 S.Ct. 2791). A health exception is required at any stage of a pregnancy because "a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Id.*

The Tenth Circuit considered the constitutionality of a Colorado parental notification law, which is similar to the New Hampshire Act, under *Roe, Casey,* and *Stenberg. Owens,* 287 F.3d at 915-16. The court concluded that

[3] In addition, the Court noted that a law regulating a woman's access to abortion which "applies both previability and postviability aggravates the constitutional problem presented. The State's interest in regulating abortion previability is considerably weaker than postviability." *Stenberg,* 530 U.S. at 930, 120 S.Ct. 2597.

because circumstances exist in which a pregnancy complication could seriously threaten a pregnant minor's health, the Colorado law, which lacked a health exception, would "infringe[ ] on the ability of pregnant women to protect their health."[4] *Id.* at 920. The court held that the Colorado law was unconstitutional "because it fails to provide a health exception as required by the Constitution of the United States." *Id.* at 926.

Although the New Hampshire Act includes an exception to the notification requirement when an abortion is necessary to prevent the *death* of a pregnant minor, it does not include an exception to protect her *health* short of fatality. Therefore, on its face, the Act does not comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception.[5]

[4] In this case, the parties do not dispute that pregnant minors, subject to the requirements of the Act, could experience complications in their pregnancies that would endanger their health. Dr. Wayne Goldner, who is a plaintiff in this case, is an obstetrician and gynecologist practicing in Manchester, New Hampshire, and is board certified by the American Board of Obstetricians and Gynecologists and a fellow in the American College of Obstetricians and Gynecologists. Dr. Goldner provided his declaration that describes medical complications which may occur during pregnancy putting pregnant minors at risk and requiring prompt or immediate termination of the pregnancy.

[5] To the extent that the Attorney General argues that a health exception is not constitutionally required in parental notification statutes, despite *Stenberg* and *Casey,* that argument lacks merit. *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), and *H.L. v. Matheson,* 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981), cited by the Attorney General, do not support that argument. The Utah statute at issue in *Matheson* required parental notification "if possible" and was challenged for an unconstitutional violation of the right to privacy, not for lack of a health exception. *See id.* at 407, 101 S.Ct. 1164.

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The Attorney General contends that other New Hampshire statutes would provide adequate protection for a pregnant minor's health. The Attorney General cites RSA 153-A:18, which exempts a health care provider from civil liability for failure to obtain consent for emergency medical care, and RSA 627:6,VII(b), which allows certain Department of Corrections medical care providers to use force to provide treatment in an emergency. Those statutes do not address the need for a health exception in the Act. RSA 153-A:18 provides only an exemption from civil liability for lack of consent while the Act requires parental notification, not consent, prior to medical care and imposes both criminal and civil liability for violations. RSA 627:6, VII(b) pertains only to Department of Corrections medical care providers in unusual circumstances that are irrelevant to the Act. Therefore, the cited statutes do not provide an alternative health exception that is required for the Act to be constitutional.

The Attorney General also argues that the judicial bypass provision of the Act would allow an abortion, without notification, to protect the health of a pregnant minor. Even with the provisions for expediting such proceedings, the judicial bypass process necessarily delays an abortion in a health emergency.[6] Dr. Goldner states in

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Rust addressed the constitutionality of a restriction on doctors receiving federal subsidies that precluded advice on abortion as a family planning method. 500 U.S. at 179-80, 111 S.Ct. 1759. The Court upheld the challenged regulations explaining that while abortion could not be counseled as a means of family planning under the regulations, because it was beyond the scope of the funded project, the regulations did not preclude referral of women for abortions for purposes other than family planning, such as in medical emergencies. *Id.* at 195-96, 111 S.Ct. 1759.

[6] Pertaining to the speed of judicial proceedings under the Act, the judicial bypass provision requires only that those proceedings "shall be

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his declaration, which is not opposed by the Attorney General, that certain medical conditions during pregnancy require immediate abortion to protect the health of the mother and that any delay would jeopardize her health. The Attorney General has not explained how the judicial bypass provision would address the need for an immediate abortion to protect the health of the mother, and the provision on its face is insufficient to meet such a need. Therefore, the judicial bypass process does not save the Act from the lack of a constitutionally required health exception.

B. *Death Exception*

The plaintiffs contend that the death exception in the Act is unconstitutionally narrow. The plaintiffs challenge the condition that the "attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26, I(a). Dr. Goldner states in his declaration, which is unopposed, that physicians cannot predict the course of medical complications with sufficient precision to comply with that requirement. In addition, the plaintiffs argue that abortion may at times not be the only treatment available, as the use of the limiting word "necessary" implies, but nevertheless would be the safest and most

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given precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant minor," that the court must rule within seven calendar days, that a pregnant minor would have access to the courts twenty-four hours a day and seven days each week, and that appeals would be expedited. RSA 132:26(b) & (c).

medically appropriate method to treat the patient's condition. Further, the plaintiffs contend that the statute violates physicians' due process rights by failing to allow them to rely on their good faith medical judgment in treating their patients.

In response, the Attorney General concedes that the death exception must be construed to include a scienter requirement to avoid constitutional infirmity. *See Colautti v. Franklin,* 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979). The court, however, is not authorized to construe a state statute to include unwritten limitations "unless such a construction is reasonable and readily apparent." *Stenberg,* 530 U.S. at 944, 120 S.Ct. 2597 (internal quotation marks omitted). The implied scienter requirement suggested by the Attorney General, that physicians who make a good faith, objectively reasonable effort to comply with the Act would not be subject to prosecution, is neither reasonable nor readily apparent from the context of RSA 132:26,I(a). In addition, even if that construction were appropriate, it would not be likely to save the death exception since the same language, expressly included in an abortion statute, has been held by the Sixth Circuit to be unconstitutionally vague and therefore not a scienter requirement at all. *See, e.g., Women's Med. Prof'l Corp. v. Voinovich,* 130 F.3d 187, 203-10 (6th Cir.1997).

Therefore, the death exception provided in RSA 132:26,I(a) is unconstitutional.

C. *Confidentiality*

A judicial bypass procedure, included as part of a parental notification law, must protect the anonymity of

the minor who is seeking judicial authorization for an abortion. *Bellotti,* 443 U.S. at 644, 99 S.Ct. 3035. Anonymity is required because laws regulating abortion that "raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy . . . pose an unacceptable danger of deterring the exercise of that right, and must be invalidated." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists,* 476 U.S. 747, 767, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), *overruled on other grounds by Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674. In this context, "[c]onfidentiality differs from anonymity, but we do not believe that the distinction has constitutional significance." *Ohio v. Akron Ctr. for Reprod. Health,* 497 U.S. 502, 513, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990). The Supreme Court, however, has "refuse[d] to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees." *Id.*

RSA 132:26, II(b) provides only that court proceedings under that chapter "shall be confidential." The plaintiffs argue that the lack of specificity makes the statute insufficient to comply with the constitutionally mandated confidentiality requirement. The Attorney General defends the confidentiality provision, contending that it is constitutionally sufficient.

As might be expected, courts applying *Bellotti* and *Akron* have come to differing conclusions about the sufficiency of confidentiality provisions in similar contexts. *See, e.g., Planned Parenthood of S. Ariz. v. Lawall,* 307 F.3d 783, 787-89 (9th Cir.2002); *Planned Parenthood of the Blue Ridge v. Camblos,* 155 F.3d 352, 379-80 (4th Cir.1998). The confidentiality requirement in the New Hampshire Act does raise a constitutional question. However, in view of

the fact that the Act is otherwise unconstitutional, the court declines to rule on the facial validity of the confidentiality provision at this time.

D. *Severability*

The Attorney General contends that if the court were to find parts of the Act unconstitutional, then the severability provision of the Act, RSA 132:28, should be invoked and the unconstitutional parts of the Act should be severed from the remainder. The lack of a health exception renders the entire Act unconstitutional and, therefore, severing parts would not remedy that deficiency. Similarly, severing the constitutionally deficient death exception from the remainder of the Act would add to its infirmity, due to the complete absence of a death exception to the parental notification requirement. Therefore, the severability clause is of no use in these circumstances.

E. *Declaratory Judgment*

For the foregoing reasons, the Act, to be codified at RSA 132:24 through RSA 132:28, is declared to be unconstitutional.

II. *Injunction*

The plaintiffs seek an injunction to prevent enforcement of the Act upon its effective date, December 31, 2003, and thereafter. The Attorney General opposes an injunction.

"In order to issue a permanent injunction, a district court typically must find that (1) the plaintiff has demonstrated actual success on the merits of its claims; (2) the

plaintiff would be irreparably injured in the absence of injunctive relief; (3) the harm to the plaintiff from defendant's conduct would exceed the harm to the defendant accruing from the issuance of an injunction; and (4) the public interest would not be adversely affected by an injunction." *United States v. Mass. Water Res. Auth.*, 256 F.3d 36, 51 n. 15 (1st Cir.2001). Here, the plaintiffs have demonstrated actual success by showing that the Act is unconstitutional, entitling them to a declaratory judgment. In the particular circumstances of a case challenging the constitutionality of abortion legislation, "a conclusion that a particular requirement is probably unconstitutional necessarily entails a decision as to the other preliminary injunction criteria as well." *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1023 (1st Cir.1981). The same is true in the context of a permanent injunction.

Denying the requested injunction to bar enforcement of the Act "may result in other women not having abortions that they would otherwise have had" but for the unconstitutional Act. *Id.* Dr. Goldner states in his declaration that the lack of a health exception and the narrow death exception put pregnant minors at substantial risk if the Act were enforced. The balance between the state's interest in "the potentiality of human life" and the plaintiffs' interest in protecting the health of pregnant minors must necessarily be struck in favor of the plaintiffs. *See Stenberg*, 530 U.S. at 930, 120 S.Ct. 2597. Although an injunction would negatively affect the benefits of involving parents in a pregnant minor's decision whether or not to terminate her pregnancy, the public interest in the health of pregnant minors under emergency circumstances would be protected by an injunction. Therefore, on balance, a

permanent injunction against enforcement of the Act is appropriate in this case.

Conclusion

For the foregoing reasons, the plaintiffs' motion for an injunction (document no. 6) is subsumed into the plaintiffs' request for a permanent injunction, which is granted. The plaintiffs' request in the complaint for a declaratory judgment is also granted. The Parental Notification Prior to Abortion Act, 2003 N.H. Laws ch. 173, effective date, December 31, 2003, to be codified at RSA 132:24-:28, is unconstitutional for the reasons previously stated.

Injunction Order

The Attorney General of the State of New Hampshire, and those acting pursuant to and under his direction and authority, are hereby enjoined from enforcing the Parental Notification Prior to Abortion Act, 2003 N.H. Laws ch. 173, to be codified at RSA 132:24-28, on its effective date or at any time thereafter.

The clerk of court shall enter judgment accordingly.

SO ORDERED.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

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v.

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Opinion No. 2003 DNH 222

Peter Heed, Attorney General of New Hampshire

ORDER

(Filed: Dec. 29, 2003)

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After carefully reviewing the provisions of the Act and the applicable United States Supreme Court precedents,

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Background

In June of 2003, the New Hampshire Senate and House of Representatives passed "AN ACT requiring parental notification before abortions may be performed on unemancipated minors." The Act defines "abortion" as:

> the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

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an agent." Paragraph III provides an alternative to allow notice by certified mail, return receipt requested, with delivery restricted to the addressee.

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Violation of the Act carries penalties. "Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification." RSA 132:27. Liability may be avoided if the person who performed the abortion can establish "by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding the information necessary to comply with this section are bone [sic] fide and true, or if the

person has attempted with reasonable diligence to deliver notice, but has been unable to do so." *Id.*

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In *Casey,* the Court considered the facial constitutionality of a Pennsylvania law that imposed conditions on performing abortions for both adult and minor patients and, without mentioning *Salerno,* applied a standard of whether the challenged law imposes an "undue burden" or "will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 874, 877 & 895 (1992). In *Stenberg v. Carhart,* 530 U.S. 914, 921 (2000), the Court concluded that a Nebraska abortion statute was unconstitutional, after applying a three level test, including the "undue burden" standard, also without mentioning *Salerno.*

The First Circuit has not addressed the question of whether the *Salerno* standard applies in the context of

abortion legislation.[2] Several other courts have concluded, however, that *Casey* and *Stenberg* provide the governing standard and that the *Salerno* standard does not apply. *See, e.g., A Woman's Choice-East Side Women's Clinic v. Newman,* 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied A Woman's Choice-East Side Women's Clinic v. Brizzi,* 537 U.S. 1192 (2003); *Planned Parenthood of the Rocky Mts. Servs. v. Owens,* 287 F.3d 910, 917 (10th Cir. 2002); *Planned Parenthood of Cent. N.J. v. Farmer,* 220 F.3d 127, 142-43 (3d Cir. 2000); *Planned Parenthood of Southern Ariz. v. Lawall,* 180 F.3d 1022, 1025-26 (9th Cir. 1999), *amended on denial of rehear'g,* 193 F.3d 1042 (9th Cir. 1999); *R.I. Med. Soc'y v. Whitehouse,* 66 F. Supp. 2d 288, 312-13 (D.R.I. 1999) (citing additional cases). The Fourth and Fifth Circuits alone have chosen to apply *Salerno* in the context of abortion legislation. *See Manning v. Hunt,* 119 F.3d 254, 269 (4th Cir. 1997) (noting circuit split and citing cases). This court is satisfied that the *Casey* and *Stenberg* standard applies in the context of abortion legislation, as is well documented by a majority of courts that have considered the question. Therefore, that standard will be followed in this case.

The United States Supreme Court decided in 1973 that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to

[2] However, having limited *Salerno* to cases that do not involve constitutionally protected conduct, it appears likely that the First Circuit would not apply *Salerno* in cases involving laws restricting access to abortion services. *See Donovan,* 311 F.3d at 77.

encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade,* 410 U.S. 113, 153 (1973). In *Roe,* the Supreme Court held that a Texas criminal statute which excepted "only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 164. The Supreme Court has also held that minors, as well as adults, have a constitutional right to choose an abortion. *See Bellotti v. Baird,* 443 U.S. 622, 633, 642 (1979); *Planned Parenthood of Mo. v. Danforth,* 428 U.S. 52, 72-5 (1976). During the three decades that have passed since *Roe v. Wade,* the Supreme Court and lower federal courts and state courts have continued to address issues arising from the recognition of a woman's constitutional right to decide whether to terminate a pregnancy. *See, e.g., Stenberg,* 530 U.S. at 920; *Casey,* 505 U.S. at 843-44; *Owens,* 287 F.3d at 917; *Humphreys v. Clinic for Women, Inc.,* 796 N.E.2d 247 (Ind. 2003); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.,* 56 P.3d 28 (Ariz. 2002).

The right to choose to terminate a pregnancy may be subject to limitation, the degree of which depends upon the stage of the pregnancy and the state's interest both in the health of the mother and in promoting "the potentiality of human life." *Roe,* 410 U.S. at 164. "[B]efore 'viability . . . the woman has a right to choose to terminate her pregnancy.'" *Stenberg,* 530 U.S. at 921 (quoting *Casey,* 505 U.S. at 870)). "'[A] law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional[,] . . . [and] [a]n 'undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or

effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" *Id.* After viability of the fetus, the state may "'"regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."'" *Id.* (quoting *Casey,* 505 U.S. at 879, *quoting Roe,* 410 U.S. at 164-65).

The Supreme Court has upheld state laws requiring parental notification prior to performing abortions on minors. *See Lambert v. Wicklund,* 520 U.S. 292 (1997); *Casey,* 505 U.S. at 899. In *Lambert,* cited by the Attorney General, the Court rejected the plaintiff's argument that the judicial bypass procedure, incorporated in the state law, was deficient because it required a showing that parental notification was not in the minor's best interests rather than a showing that an abortion without notification was in her best interest. 520 U.S. at 294. However, the *Lambert* Court did not consider the issues that have been raised in this case.

A. Health Exception

In *Casey,* the Supreme Court considered five provisions of Pennsylvania law pertaining to abortion. 505 U.S. at 844. One of those provisions required a minor to obtain the informed consent of a parent before the procedure but also provided a judicial bypass option and an exception for a medical emergency. *Id.* The plaintiffs challenged the consent provision on the single ground that it required informed parental consent. *Id.* Given the limited challenge and the judicial bypass and emergency exceptions to the consent requirement, the Court concluded that the provision passed constitutional muster. *Id.* at 899.

The Supreme Court later reiterated and clarified *Casey,* a plurality opinion, in *Stenberg,* stating that "the governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.'"[3] *Stenberg,* 530 U.S. at 931 (quoting *Casey,* 505 U.S. at 879). A health exception is required at any stage of a pregnancy because "a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Id.*

The Tenth Circuit considered the constitutionality of a Colorado parental notification law, which is similar to the New Hampshire Act, under *Roe, Casey,* and *Stenberg. Owens,* 287 F.3d at 915-16. The court concluded that because circumstances exist in which a pregnancy complication could seriously threaten a pregnant minor's health, the Colorado law, which lacked a health exception, would "infringe[ ] on the ability of pregnant women to protect their health."[4] *Id.* at 920. The court held that the Colorado law was unconstitutional "because it fails to provide a

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[3] In addition, the Court noted that a law regulating a woman's access to abortion which "applies both previability and postviability aggravates the constitutional problem presented. The State's interest in regulating abortion previability is considerably weaker than postviability." *Stenberg,* 530 U.S. at 930.

[4] In this case, the parties do not dispute that pregnant minors, subject to the requirements of the Act, could experience complications in their pregnancies that would endanger their health. Dr. Wayne Goldner, who is a plaintiff in this case, is an obstetrician and gynecologist practicing in Manchester, New Hampshire, and is board certified by the American Board of Obstetricians and Gynecologists and a fellow in the American College of Obstetricians and Gynecologists. Dr. Goldner provided his declaration that describes medical complications which may occur during pregnancy putting pregnant minors at risk and requiring prompt or immediate termination of the pregnancy.

health exception as required by the Constitution of the United States." *Id.* at 926.

Although the New Hampshire Act includes an exception to the notification requirement when an abortion is necessary to prevent the *death* of a pregnant minor, it does not include an exception to protect her *health* short of fatality. Therefore, on its face, the Act does not comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception.[5]

The Attorney General contends that other New Hampshire statutes would provide adequate protection for a pregnant minor's health. The Attorney General cites RSA 153-A:18, which exempts a health care provider from civil liability for failure to obtain consent for emergency medical care, and RSA 627:6, VII(b), which allows certain Department of Corrections medical care providers to use force to provide treatment in an emergency. Those statutes do not address the need for a health exception in the Act.

[5] To the extent that the Attorney General argues that a health exception is not constitutionally required in parental notification statutes, despite *Stenberg* and *Casey*, that argument lacks merit. *Rust v. Sullivan*, 500 U.S. 173 (1991), and *H.L. v. Matheson*, 450 U.S. 398 (1981), cited by the Attorney General, do not support that argument. The Utah statute at issue in *Matheson* required parental notification "if possible" and was challenged for an unconstitutional violation of the right to privacy, not for lack of a health exception. *See id.* at 407. *Rust* addressed the constitutionality of a restriction on doctors receiving federal subsidies that precluded advice on abortion as a family planning method. 500 U.S. at 179-80. The Court upheld the challenged regulations explaining that while abortion could not be counseled as a means of family planning under the regulations, because it was beyond the scope of the funded project, the regulations did not preclude referral of women for abortions for purposes other than family planning, such as in medical emergencies. *Id.* at 195-96.

RSA 153-A:18 provides only an exemption from civil liability for lack of consent while the Act requires parental notification, not consent, prior to medical care and imposes both criminal and civil liability for violations. RSA 627:6, VII(b) pertains only to Department of Corrections medical care providers in unusual circumstances that are irrelevant to the Act. Therefore, the cited statutes do not provide an alternative health exception that is required for the Act to be constitutional.

The Attorney General also argues that the judicial bypass provision of the Act would allow an abortion, without notification, to protect the health of a pregnant minor. Even with the provisions for expediting such proceedings, the judicial bypass process necessarily delays an abortion in a health emergency.[6] Dr. Goldner states in his declaration, which is not opposed by the Attorney General, that certain medical conditions during pregnancy require immediate abortion to protect the health of the mother and that any delay would jeopardize her health. The Attorney General has not explained how the judicial bypass provision would address the need for an immediate abortion to protect the health of the mother, and the provision on its face is insufficient to meet such a need. Therefore, the judicial bypass process does not save the

[6] Pertaining to the speed of judicial proceedings under the Act, the judicial bypass provision requires only that those proceedings "shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant minor," that the court must rule within seven calendar days, that a pregnant minor would have access to the courts twenty-four hours a day and seven days each week, and that appeals would be expedited. RSA 132:26(b) & (c).

Act from the lack of a constitutionally required health exception.

B. Death Exception

The plaintiffs contend that the death exception in the Act is unconstitutionally narrow. The plaintiffs challenge the condition that the "attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26, I(a). Dr. Goldner states in his declaration, which is unopposed, that physicians cannot predict the course of medical complications with sufficient precision to comply with that requirement. In addition, the plaintiffs argue that abortion may at times not be the only treatment available, as the use of the limiting word "necessary" implies, but nevertheless would be the safest and most medically appropriate method to treat the patient's condition. Further, the plaintiffs contend that the statute violates physicians' due process rights by failing to allow them to rely on their good faith medical judgment in treating their patients.

In response, the Attorney General concedes that the death exception must be construed to include a scienter requirement to avoid constitutional infirmity. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979). The court, however, is not authorized to construe a state statute to include unwritten limitations "unless such a construction is reasonable and readily apparent." *Stenberg*, 530 U.S. at 944 (internal quotation marks omitted). The implied scienter requirement suggested by the Attorney General, that physicians who make a good faith, objectively reasonable effort to

comply with the Act would not be subject to prosecution, is neither reasonable nor readily apparent from the context of RSA 132:26, I(a). In addition, even if that construction were appropriate, it would not be likely to save the death exception since the same language, expressly included in an abortion statute, has been held by the Sixth Circuit to be unconstitutionally vague and therefore not a scienter requirement at all. *See, e.g., Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 203-10 (6th Cir. 1997).

Therefore, the death exception provided in RSA 132:26, I(a) is unconstitutional.

C. Confidentiality

A judicial bypass procedure, included as part of a parental notification law, must protect the anonymity of the minor who is seeking judicial authorization for an abortion. *Bellotti*, 443 U.S. at 644. Anonymity is required because laws regulating abortion that "raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy . . . pose an unacceptable danger of deterring the exercise of that right, and must be invalidated." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 767 (1986), *overruled on other grounds by Casey*, 505 U.S. 833. In this context, "[c]onfidentiality differs from anonymity, but we do not believe that the distinction has constitutional significance." *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513 (1990). The Supreme Court, however, has "refuse[d] to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees." *Id.*

RSA 132:26, II(b) provides only that court proceedings under that chapter "shall be confidential." The plaintiffs argue that the lack of specificity makes the statute insufficient to comply with the constitutionally mandated confidentiality requirement. The Attorney General defends the confidentiality provision, contending that it is constitutionally sufficient.

As might be expected, courts applying *Bellotti* and *Akron* have come to differing conclusions about the sufficiency of confidentiality provisions in similar contexts. *See, e.g., Planned Parenthood of S. Ariz. v. Lawall,* 307 F.3d 783, 787-89 (9th Cir. 2002); *Planned Parenthood of the Blue Ridge v. Camblos,* 155 F.3d 352, 379-80 (4th Cir. 1998). The confidentiality requirement in the New Hampshire Act does raise a constitutional question. However, in view of the fact that the Act is otherwise unconstitutional, the court declines to rule on the facial validity of the confidentiality provision at this time.

D. Severability

The Attorney General contends that if the court were to find parts of the Act unconstitutional, then the severability provision of the Act, RSA 132:28, should be invoked and the unconstitutional parts of the Act should be severed from the remainder. The lack of a health exception renders the entire Act unconstitutional and, therefore, severing parts would not remedy that deficiency. Similarly, severing the constitutionally deficient death exception from the remainder of the Act would add to its infirmity, due to the complete absence of a death exception to the parental notification requirement. Therefore, the severability clause is of no use in these circumstances.

E. Declaratory Judgment

For the foregoing reasons, the Act, to be codified at RSA 132:24 through RSA 132:28, is declared to be unconstitutional.

II. Injunction

The plaintiffs seek an injunction to prevent enforcement of the Act upon its effective date, December 31, 2003, and thereafter. The Attorney General opposes an injunction.

"In order to issue a permanent injunction, a district court typically must find that (1) the plaintiff has demonstrated actual success on the merits of its claims; (2) the plaintiff would be irreparably injured in the absence of injunctive relief; (3) the harm to the plaintiff from defendant's conduct would exceed the harm to the defendant accruing from the issuance of an injunction; and (4) the public interest would not be adversely affected by an injunction." *United States v. Mass. Water Res. Auth.,* 256 F.3d 36, 51 n.15 (1st Cir. 2001). Here, the plaintiffs have demonstrated actual success by showing that the Act is unconstitutional, entitling them to a declaratory judgment. In the particular circumstances of a case challenging the constitutionality of abortion legislation, "a conclusion that a particular requirement is probably unconstitutional necessarily entails a decision as to the other preliminary injunction criteria as well." *Planned Parenthood League of Mass. v. Bellotti,* 641 F.2d 1006, 1023 (1st Cir. 1981). The same is true in the context of a permanent injunction.

Denying the requested injunction to bar enforcement of the Act "may result in other women not having abortions that they would otherwise have had" but for the

unconstitutional Act. *Id.* Dr. Goldner states in his declaration that the lack of a health exception and the narrow death exception put pregnant minors at substantial risk if the Act were enforced. The balance between the state's interest in "the potentiality of human life" and the plaintiffs' interest in protecting the health of pregnant minors must necessarily be struck in favor of the plaintiffs. *See Stenberg,* 530 U.S. at 930. Although an injunction would negatively affect the benefits of involving parents in a pregnant minor's decision whether or not to terminate her pregnancy, the public interest in the health of pregnant minors under emergency circumstances would be protected by an injunction. Therefore, on balance, a permanent injunction against enforcement of the Act is appropriate in this case.

Conclusion

For the foregoing reasons, the plaintiffs' motion for an injunction (document no. 6) is subsumed into the plaintiffs' request for a permanent injunction, which is granted. The plaintiffs' request in the complaint for a declaratory judgment is also granted. The Parental Notification Prior to Abortion Act, 2003 N.H. Laws ch. 173, effective date, December 31, 2003, to be codified at RSA 132:24-:28, is unconstitutional for the reasons previously stated.

Injunction Order

The Attorney General of the State of New Hampshire, and those acting pursuant to and under his direction and authority, are hereby enjoined from enforcing the Parental Notification Prior to Abortion Act, 2003 N.H. Laws ch. 173,

to be codified at RSA 132:24-28, on its effective date or at any time thereafter.

The clerk of court shall enter judgment accordingly.

SO ORDERED.

/s/ Joseph A. DiClerico, Jr.
Joseph A. DiClerico, Jr.
United States District Judge

December 29, 2003

cc: Jennifer Dalven, Esquire
Martin P. Honigberg, Esquire
Dara Klassel, Esquire
Daniel J. Mullen, Esquire
Lawrence A. Vogelman, Esquire

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Planned Parenthood of Northern New England, et al.

v. Civil Action No. C.03-491-JD

Peter Heed, Attorney General of New Hampshire

JUDGMENT

(Filed Dec. 29, 2003)

In accordance with the Order this date by United States District Judge Joseph A. DeClerico, Jr., judgment is hereby entered.

By the Court,

/s/ James Starr
James R. Starr, Clerk

December 29, 2003

cc: Jennifer Dalven, Esq.
Martin P. Honigberg, Esq.
Lawrence Vogelman, Esq.
Dara Klassel, Esq.
Daniel Mullen, Esq.

(3)

No. 04-1144

Supreme Court, U.S.
FILED
APR 13 2005
OFFICE OF THE CLERK

Supreme Court of the United States

KELLY A. AYOTTE, Attorney General of the State of New Hampshire, in her official capacity,

Petitioner,

—v.—

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and WAYNE GOLDNER, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the First Circuit Court of Appeals correctly held that the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2003), which criminalizes providing an abortion to a minor without written notice to a parent or guardian, is unconstitutional because it lacks an exception for the preservation of a pregnant minor's health.

2. Whether the First Circuit Court of Appeals correctly held that neither a judicial bypass nor other existing New Hampshire state laws serve as an adequate substitute for a health exception.

STATEMENT PURSUANT TO RULE 29.6

Respondent Planned Parenthood of Northern New England does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Respondent Concord Feminist Health Center does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Respondent Feminist Health Center of Portsmouth does not have a parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Respondent Wayne Goldner, M.D., is an individual.

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IN THE

Supreme Court of the United States

No. 04-1144

KELLY A. AYOTTE, Attorney General of the
State of New Hampshire, in her official capacity,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND,
CONCORD FEMINIST HEALTH CENTER,
FEMINIST HEALTH CENTER OF PORTSMOUTH,
AND WAYNE GOLDNER, M.D.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT OF THE CASE

A. Facts

In June 2003, the New Hampshire Legislature passed the Parental Notification Prior to Abortion Act (the "Act"). N.H. Rev. Stat. Ann. ("RSA") 132:24-28 (2003). The Act prohibits performance of an abortion upon an unemancipated minor unless the physician or his or her agent provides at least forty-eight hours advance notice of the abortion to one of the minor's parents. RSA 132:25, I. The forty-eight hour notice period begins to run from the time of delivery of the notice. Notice may be delivered in person to the parent's residence or by certified mail. If sent by certified mail, the

notice is deemed delivered at noon on the next day on which regular mail delivery takes place subsequent to mailing. RSA 132:25, II & III. These requirements may be dispensed with if the parent certifies in writing that he or she has been notified. RSA 132:26, I(b).

In lieu of parental notification, a minor may petition a court of competent jurisdiction for a waiver of the notice requirement. The court must grant the waiver if it finds that the minor is mature and capable of giving informed consent to the abortion, or the performance of an abortion without parental notification is in the minor's best interests. RSA 132:26, II. The trial court has seven calendar days to rule on the minor's petition. RSA 132:26, II(b). A minor may appeal an adverse decision. After the appeal is docketed, the appellate court has another seven days to rule on the appeal. RSA 132:26, II(c).

The Act states that "[p]roceedings in the court under this section shall be confidential," and a "confidential appeal shall be available," but no specific procedures are set forth in the statute to effectuate this right of confidentiality. RSA 132:26, II(b), (c).

For minors facing medical emergencies, a physician may dispense with the Act's requirements of notice and delay only when the attending physician can "certif[y] . . . that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26, I(a). The Act lacks any exception for medical emergencies short of imminent death.

Violation of the Act is a misdemeanor and grounds for a civil action by a person wrongfully denied notification. RSA 132:27.

The uncontested declaration of Wayne Goldner, M.D., explained that delays caused by the Act could endanger the health of pregnant minors.

B. Proceedings Below

On November 17, 2003, Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth and Wayne Goldner, M.D., filed a complaint in the United States District Court for the District of New Hampshire seeking a declaratory judgment that the Act was unconstitutional and an injunction to prevent its enforcement once it became effective on December 31, 2003. Plaintiffs asserted that the Act was unconstitutional because it lacks a health exception to the parental notification requirement. Plaintiffs also contended that the Act's exception to prevent death was unconstitutionally narrow and that the confidentiality provisions for the judicial bypass proceedings were constitutionally deficient.

The district court declared the Act unconstitutional on its face and enjoined its enforcement. *See* Pet. App. 25a. The district court found that it is undisputed that pregnant minors subject to the Act could suffer medical conditions requiring an immediate abortion to protect their health. *See* Pet. App. 49a n.4, 51. It then ruled that without a health exception to protect these minors, the Act was unconstitutional. *See* Pet. App. 38a. It also held that the Act was unconstitutional because its death exception was too narrow. *See* Pet. App. 35a-36a. Although the district court found that the Act's confidentiality provisions raised constitutional questions, it declined to rule on their validity in view of the fact that it held the Act otherwise unconstitutional. *See* Pet. App. 37a-38a.

The court of appeals affirmed. Citing *Stenberg v. Carhart*, 530 U.S. 914, 929-30 (2000), it held that the Supreme Court has identified "a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of a pregnant woman's health." Pet. App. 9a. The First Circuit emphasized that under *Stenberg* this requirement is in addition to and independent of the constitutional requirement

that an abortion regulation not impose an undue burden on a woman's right to terminate her pregnancy. *See* Pet. App. 9a-10a. The First Circuit expressly rejected Petitioner's claims that the judicial bypass procedure or other provisions of New Hampshire law could serve as the functional equivalent of an explicit health exception. *See* Pet. App. 16a-17a. The court of appeals also found that the Act was constitutionally infirm because its death exception was too narrowly drawn. *See* Pet. App. 17a-21a. Finally, like the district court, the court of appeals held it was not necessary to evaluate the adequacy of the Act's confidentiality provisions because it had "already found the Act in its entirety unconstitutional on other grounds." Pet. App. 22a.

REASONS FOR DENYING THE WRIT

A. The First Circuit's Determination That the Act Unconstitutionally Fails to Provide a Health Exception is Squarely in Line With This Court's Jurisprudence and Other Circuit Court Decisions.

Review is not warranted on the question of what standard applies in determining whether an abortion restriction requires a health exception because this Court has directly addressed the issue and there is no conflict among the circuits. Petitioner claims there is a circuit split regarding whether the "large fraction" test established in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), has replaced the "no set of circumstances" standard from *United States v. Salerno*, 481 U.S. 739 (1987), in facial challenges to abortion regulations. *See* Pet. Br. at 10-11. In fact, neither standard applies to the issue in this case: whether an abortion restriction requires a health exception. Under this Court's decisions, a health exception is an independent constitutional requirement in abortion regulations, and all appeals courts to have addressed the issue agree that a health exception is the *sine qua non* of validity for parental involvement laws.

1. This Court's precedent makes clear that an abortion regulation that lacks an exception to preserve the health of the pregnant woman is unconstitutional.

This Court's decisions required the First Circuit to conclude that the Act was invalid because it lacked an exception to preserve the health of the pregnant woman. In an unbroken line of cases running from *Roe v. Wade* to *Planned Parenthood v. Casey* to *Stenberg v. Carhart*, this Court has consistently held that laws that restrict access to abortion are unconstitutional unless they contain adequate exceptions to protect women's health and lives. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *Casey*, 505 U.S. at 846, 879-80; *Stenberg*, 530 U.S. at 931.

In addition to recognizing that the Constitution guarantees women the right to abortion prior to fetal viability, 410 U.S. at 153, 163-64, *Roe v. Wade* held that even post-viability abortion bans must contain a health exception, *id.* at 164-65.

In *Casey*, this Court held that Pennsylvania's abortion restrictions – which included a parental consent requirement – would have been unconstitutional without an adequate health exception since "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion . . . if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880.

Just four years ago, this Court reaffirmed that, to pass constitutional muster, abortion regulations must contain a health exception. *Stenberg*, 530 U.S. at 930 (holding that because "the law requires a health exception . . . to validate even a postviability abortion regulation, it at a minimum requires the same in respect to [a] previability regulation"). In *Stenberg*, this Court held that a Nebraska law that prohibited certain methods of abortion except where necessary to save the woman's life was unconstitutional because it "lack[ed] any exception for the preservation of the

. . . health of the mother." *Id.* (internal quotations and citation omitted).[1]

Furthermore, *Stenberg* made clear that the health exception requirement is separate and independent from the requirement that regulations not impose an undue burden on a woman's right to terminate her pregnancy. In striking down the Nebraska law, this Court found it was unconstitutional "for at least two *independent* reasons. First, the law lacks any exception for the preservation of the . . . health of the mother. Second, it imposes an undue burden . . . ." (emphasis added) (internal quotations and citations omitted); *see also Stenberg*, 530 U.S. at 947-48 (O'Connor, J., concurring) ("First, the Nebraska statute is inconsistent with *Casey* because it lacks an exception . . . to preserve the health of the mother. . . . Second, Nebraska's statute is unconstitutional on the alternate and independent ground that it imposes an undue burden . . . .").[2] Consequently, there is no need to address whether the "undue burden" for a "large fraction" of affected women test established in *Casey* has replaced the "no set of circumstances" standard from *Salerno*.

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[1] *Hodgson v. Minnesota*, 497 U.S. 417 (1990), upheld a parental notification statute with no health exception, but as the First Circuit correctly observed, the necessity of a health exception was not before the Court. *See* Pet. App. 13a n.6. Both *Casey* and *Stenberg*, cases decided after *Hodgson*, have unequivocally established the need for a health exception.

[2] *Stenberg* also makes clear that a health exception is constitutionally required regardless of the state's interest underlying an abortion regulation. As the First Circuit explained, "[i]n considering an abortion regulation based on interests other than the one identified in *Roe*, . . . the Supreme Court has determined that it 'cannot see how the interest-related differences could make any difference to the . . . application of the 'health' requirement.' *Stenberg*, 530 U.S. at 931. . . . Thus, regardless of the interests served by New Hampshire's parental notice statute, it does not escape the Constitution's requirement of a health exception." Pet. App. 12a.

2. There is no circuit split regarding the necessity of a health exception in parental involvement laws.

Since *Stenberg*, two circuit courts in addition to the First Circuit have applied the health exception requirement to parental involvement laws. Both struck down parental involvement laws because they lacked an adequate exception to protect the health of the pregnant minor. As no court of appeals after *Casey* or *Stenberg* has upheld a parental involvement law without a health exception, there is no split in the circuit courts regarding the necessity of a health exception.

The Tenth Circuit reviewed the constitutionality of a Colorado parental notice law. Like the New Hampshire Act, the Colorado law contained an exception for circumstances where an abortion was necessary to prevent death, but no exception for circumstances where a minor needs a prompt abortion to preserve her health. *See Planned Parenthood v. Owens*, 287 F.3d 910 (10th Cir. 2002). The Tenth Circuit held that the law was "unconstitutional because it fail[ed] to provide a health exception as required by the Constitution of the United States." *Id.* at 927.

The Ninth Circuit reviewed an Idaho parental consent law with a limited health exception. In finding the statute's exception unconstitutionally narrow, the Ninth Circuit held that "[a] health exception is as requisite in statutory or regulatory provisions affecting only minors' access to abortion as it is in regulations concerning adult women." *Planned Parenthood v. Wasden*, 376 F.3d 908, 923 (9th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3338 (U.S. Mar. 28, 2005) (No. 04-703); *see also id.* at 922 ("An adequate health exception . . . is a *per se* constitutional requirement."); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 203 (6th Cir. 1997) ("any abortion regulation that might delay an abortion must contain a valid medical emergency exception").

3. A judicial bypass procedure does not save the Act from the lack of a constitutionally required health exception.

Although Petitioner claims that the judicial bypass provision of the Act obviates the need for a health exception, *see* Pet. Br. at 11-12, this Court's decision in *Casey* forecloses such a conclusion. And because no appeals court – or indeed any court – has upheld a judicial bypass as a stand-in for a health exception, there is no circuit split on this issue.

In *Casey*, this Court considered the constitutionality of a Pennsylvania law that required minors to obtain parental consent or a judicial bypass and required all women to delay their abortions for twenty-four hours after receiving state-mandated information. In evaluating Plaintiffs' claim that the health exception in the Pennsylvania statute was too narrow, this Court held that a health exception that "foreclose[d] the possibility of an immediate abortion despite some significant health risks" would be unconstitutional. *Casey*, 505 U.S. at 879. Yet this is exactly what may happen under a judicial bypass procedure. The courts below held that some minors may suffer significant health risks without a prompt abortion. The Act, however, allows courts seven calendar days to rule on a minor's petition, and another seven days after docketing to rule on an appeal. As the First Circuit correctly held in finding a bypass to be an insufficient substitute, "[e]ven when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk." Pet. App. 17a. No post-*Casey* appeals court has ever disagreed. Thus, a bypass procedure cannot save the Act from the lack of a constitutionally required health exception, and there is no need to review the First Circuit's decision to this effect.[3]

[3] Petitioners also claim that the judicial bypass procedure makes the death exception constitutional. *See* Pet. Br. at 12. But for the same reasons discussed above, the bypass procedure can no more save the death exception than it can the health exception.

B. The Question of Whether New Hampshire Statutes RSA 153-A:18, RSA 676:6, VII(b) and RSA 627:3 Provide a Functional Equivalent of a Health Exception Is Not Constitutionally Important.

Nor is there any need for this Court to decide whether a statute regulating abortion must contain an explicit health exception or whether the Constitution may be satisfied by reading in a health exception from other provisions of state law. Contrary to Petitioner's suggestion, *see* Pet. Br. at 11, this question was not reached by the First Circuit. The First Circuit assumed that the health exception need not be included in the parental notification statute itself. It then held that the New Hampshire statutes proffered by Petitioner did not create an adequate health exception,[4] and that in any case under New Hampshire rules of statutory construction they could not be read into the parental notification law. This ruling does not present important constitutional issues.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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[4] These statutes are RSA 153-A:18, RSA 676:6, VII(b) and RSA 627:3.

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No. 04-1144

IN THE
SUPREME COURT OF THE UNITED STATES

KELLY A. AYOTTE, ATTORNEY
GENERAL OF NEW HAMPSHIRE,
Petitioner

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, et al
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow counsel to represent the children being killed by *Roe v. Wade*, 410 U.S. 113(1973). Since there will be no expense to the Court, this is effectively a motion to allow retained counsel.

INTEREST OF COUNSEL

Counsel will prove that the U.S. Constitution's guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn.

SUMMARY OF ARGUMENT

The unborn have a legal right to be represented by counsel, and to be aided by all the procedures guaranteed by the Constitution, so counsel can prove that the U.S. Constitution's guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn.

ARGUMENT

I.

THE COURT HAS USED THE MOCK TRIALS TO EFFECT AND MAINTAIN ITS *ROE v. WADE* KILLINGS WHICH THE NUREMBERG TRIBUNAL CONDEMNED AS "NOT A JUDICIAL PROCEEDING BUT A MURDER."[1]

A. The Court Effected and Maintains Its *Roe v. Wade* Killings by Unconstitutionally Refusing to Allow Counsel to Represent the Unborn and Defend their Constitutional Right to Life.

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[1] The Court's procedures are also described in the book by Alan Ernest, *Mass Murder Is Liberty: How The United States Is Ruled by the Decree MASS MURDER IS LIBERTY* 45-53 (1998).

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in *Roe v. Wade*. An original party objected that the unborn should be represented by counsel in the U.S. Supreme Court:

> "(T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth." Petition for Rehearing 5, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

But the Court refused to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution. Thus the Court commenced its killings.

And the Court has maintained its killings by steadfastly refusing to allow counsel to represent the unborn, and defend their right to life under the Constitution.[2]

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[2] *Colautti v. Franklin*, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; *Anders v. Floyd*, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; *Bellotti v. Baird*, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; *Ashcroft v. Freiman*, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied 440 U.S. 941; *United States v. Zbaraz*, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; *Harris v. McRae*, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; *H.L. v. Matheson*, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; *Simopoulos v. Virginia*, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476, motion to allow counsel for the unborn denied 458 U.S. 1104; *Akron Center for Reproductive Health v. Akron*, 462 U.S. 416, motion to allow counsel for the unborn denied 458 U.S. 1104; *Diamond v. Charles*, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; *Hartigan v. Zbaraz*, 484 U.S. 171, motion to allow counsel for the unborn denied 479 U.S. 1003; *Webster v. Reproductive Health Services*, 492 U.S. 490, motion to allow counsel for the unborn denied 489 U.S. 106; *Ohio v. Akron Center for*

The unborn have a constitutional right to be represented by counsel to defend their right to life under the U.S. Constitution.[3] Judges who willfully deny this right are guilty of

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Reproductive Health, 497 U.S. 502, motion to allow counsel for the unborn denied 493 U.S. 802; *Hodgson* v. *Minnesota*, 497 U.S. 417, motion to allow counsel for the unborn denied 492 U.S. 803; *New York* v. *Sullivan*, 500 U.S. 173, motion to allow counsel for the unborn denied 497 U.S. 1002; *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 120 L Ed 2d 674, motion to allow counsel for the unborn denied 117 L Ed 2d 614; *National Organization for Women* v. *Scheidler*, 126 L Ed 2d 99, motion to allow counsel for the unborn denied 125 L Ed 2d 786 (1993); *Schenck* v. *Pro-Choice Network of Western New York*, 137 L Ed 2d 1 (1996), motion to allow counsel for the unborn denied 135 L Ed 2d 188 (1996); *Hill* v. *Colorado*, 147 L Ed 2d 597 (1999) motion to allow counsel to represent unborn denied 145 L Ed 2d 405 (1999); *Stenberg* v. *Carhart*, 147 L Ed 2d 743 (2000), motion to allow counsel for the unborn denied, 146 L Ed 2d 216 (2000); *Scheidler* v. *National Organization for Women*, 537 U.S. 393 (2003), motion to allow counsel for the unborn denied 536 U.S. 981.

[3] Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees: (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; and (4) the right to present evidence. *Goldberg* v. *Kelly*, 397 U.S. 254, 268-271 (1970); *In Re Gault*, 387 U.S. 1 (1967).

Will the Court claim that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S. Constitution so that she could be killed with impunity from criminal laws? This is preposterous. The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws. Everyone is entitled to all these procedural protections before any court can decree that their life is not protected by the Constitution, and they can be killed with impunity from criminal statutes.

crime.[4] This denial makes *Roe v. Wade* void.

B. The Court Effected Its *Roe v. Wade* Killings by Unconstitutionally Refusing to Allow Any Prior Notice of the Standards, the Burdens of Proof, or the Evidence Which It Used to Infer that the Lives of the Unborn Are Not Protected by the Constitution.

The U.S. District Court in *Roe v. Wade* did not even look to see if the lives of the unborn were protected by the U.S. Constitution. This question was argued for the first time after the case reached the U.S. Supreme Court. Since the Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion.

In the aftermath of *Dred Scott* and the Civil War, the Fourteenth Amendment was intended to assure the people that the Court could never again convulse the nation by implying another exception to the Constitution's universal guarantee of life and liberty to "any person."[5]

But in 1973, the Court not only defied this long-standing legitimate public expectation and implied another exception to the words "any person," but it also gave the parties no prior notice of the factual and legal basis of its decision.

In particular, the Court gave the parties in *Roe v. Wade* no

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[4] *Imbler* v. *Pachtman*, 424 U.S. 409 (1976): "Even judges ... could be punished criminally for willful deprivations of constitutional rights."

[5] The history of how *Dred Scott v. Sanford*, 19 How. 393 (1857), triggered the Civil War is outlined in the *amicus curiae* brief filed herein by Legal Defense for Unborn Children at 4-6. In *Dred Scott*, the Court ruled that the words "any person" in the Fifth Amendment did not include black persons, there was a constitutional right to own a slave, and black persons could not sue in the Courts of the United States to see if they were free or slave.

prior notice of the constitutional standards, the burdens of proof, or the evidence, which the Court used to imply that the Fourteenth Amendment's express guarantee of life to "any person" did not include the unborn.

The first time the parties had notice was when *Roe v. Wade* was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn:

> (N)ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard **without giving the Appellees notice** or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones.[6]

But the Court refused to allow the original parties to have any prior notice. Thus the Court commenced its killings.

And the Court has maintained its killings despite repeated objections that the unborn had no prior notice in *Roe v. Wade* of the factual and legal bases needed to defend the unborn's right to life under the U.S. Constitution.[7]

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the protection of the Constitution so they can be killed with impunity from criminal statutes.[8] Judges who willfully deny this

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[6] Petition for Rehearing 6, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added).

[7] *See* cases in note 2, *supra*.

[8] *See* note 3, *supra*.

right are guilty of crime.[9] This denial makes *Roe v. Wade* void.

C. The Court Effected Its *Roe v. Wade* Killings By Using Unconstitutional Secret Proceedings To Find Evidence To Infer That The Lives Of The Unborn Are Not Protected By The Constitution.

In *Roe v. Wade*, the Court used secret evidentiary proceedings to find evidence to imply that the Constitution's express guarantee of life to "any person" did not include the unborn. The Court conducted these secret proceedings in its own back rooms. The parties were not allowed to be present. No public record was made of these secret proceedings.

The purpose of these secret proceedings was to give the Justices an opportunity to find evidence to conclude that the Constitution's guarantee of life to "any person," an express guarantee in absolute terms, did not mean what it plainly said, and to somehow imply that the unborn were excluded.

An original party objected to these secret proceedings:

> "The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are **unknown to the parties** but which apparently were **extricated from various sources by the Court's diligent research,** which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion...of constitutional stages of fetal growth." Petition for Rehearing 4, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). [emphasis added]

The first time the victims saw the evidence used against them was after *Roe v. Wade* was promulgated and they were already condemned to death. But the Court overruled the

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[9] *See* note 4, *supra*.

party's objection to its secret evidentiary proceedings. Thus the Court commenced its killings.

And the Court has maintained its killings despite repeated objections that it used secret proceedings in *Roe v. Wade*.[10]

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary proceedings.[11] Judges who willfully deny this right are guilty of crime.[12] This denial makes *Roe v. Wade* void.

D. The Court Effected and Maintains Its *Roe v. Wade* Killings By Unconstitutionally Refusing to Allow Its False Evidence, Which It Used to Infer that the Lives of the Unborn Are Not Protected by the Constitution, to be Confronted and Cross-Examined.

Since the Court used secret evidentiary proceedings, the original parties had not seen all the evidence which the Court used to imply that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to imply that the lives of the unborn were not protected by the U.S. Constitution:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, **which facts nevertheless should be subject to refutation and counter-evidence** since they form the foundation of the Court's opinion...of constitutional stages of fetal growth.[13]

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[10] *See* cases in note 2, *supra*.

[11] *See* note 3, *supra*.

[12] *See* note 4, *supra*.

[13] Petition for Rehearing 4, *Doe v. Bolton*, 410 U.S. 179 (1973), denied

But the Court refused to allow its evidence in *Roe v. Wade*, which it used to imply that the lives of the unborn were not protected by the U.S. Constitution, to be cross-examined. Thus the Court commenced its killings.

And despite repeated objections that the Court fabricated false evidence in *Roe v. Wade* in order to imply that the Constitution's express guarantee of life to "any person" did not include the unborn, the Court has maintained its killings by steadfastly refusing to allow its evidence to be confronted and cross-examined.[14]

The unborn have a constitutional right to confront and cross-examine the evidence which the Court used to imply that their lives are not protected by the U.S. Constitution.[15] Judges who willfully deny this right are guilty of crime.[16] This denial makes *Roe v. Wade* void.

E. The Court Effected and Maintains Its *Roe v. Wade* Killings by Unconstitutionally Refusing to Allow Evidence to Be Presented on Behalf of the Unborn to Prove that the Constitution's Guarantee of Life to "Any Person" Does Include the Unborn.

In *Roe v. Wade*, the Court invented new constitutional standards on the protection of life which the parties did not see until after *Roe v. Wade* was decided. The parties never had opportunity to present evidence under these new standards.

An original party requested "an opportunity to present evidence" under the new standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution.[17] The party said:

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410 U.S. 959 (1973). (emphasis added).

[14] *See* cases in note 2, *supra*.

[15] *See* note 3, *supra*.

[16] *See* note 4, *supra*.

[17] Petition for Rehearing at 3 - 6, 8, *Doe v. Bolton*, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

We are dealing here with a procedure long considered outlawed and which has suddenly become legal.... The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed....

Appellees have had **no opportunity to show by evidence** in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute....

With **no opportunity** for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.....

In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electro-cardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence....

At any rate, Appellees **should have an opportunity to present evidence** and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.[18]

But the Court refused to allow the party to present evidence to show that the lives of the unborn were protected by the U.S.

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[18] See note 17, *supra*. (emphasis added)

Constitution. Thus the Court commenced its killings.

And the Court has maintained its killings by steadfastly refusing to allow evidence to be presented on behalf of the unborn to prove that their lives are protected by the U.S. Constitution.[19]

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S. Constitution.[20] Judges who willfully deny this right are guilty of crime.[21] This denial makes *Roe v. Wade* void.

CONCLUSION ON JUDICIAL PROCEDURES

The Nuremberg Tribunal cited these judicial procedures as part of its evidence to convict Nazi judges of complicity in extermination and murder:

> In many instances they [the accused] were denied the right to introduce evidence, to be confronted by witnesses against them....They were...denied the right of counsel of their own choice....(T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them.[22]

The Nuremberg Tribunal said, "Such a mock trial is not a judicial proceeding but a murder."[23]

The Court used procedures to effect and maintain its *Roe v. Wade* killings which were not judicial proceedings but murders.

And the Court claims it can use such mock trials to decree

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[19] *See* cases in note 2, *supra*.

[20] *See* note 3, *supra*.

[21] *See* note 4, *supra*.

[22] *United States v. Altstoetter* [The Justice Case], 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-47 (1951).

[23] *Id.*, at 1164.

the extermination of Jews, or anyone else, to be liberty.[24]

II.
COUNSEL FOR THE UNBORN RAISES ISSUES, NOT RAISED BY THE PARTIES, WHICH DISPOSE OF ALL ISSUES IN THIS CASE.

A. The U.S. Constitution's Guarantee Of Life To "Any Person" Does Include The Unborn.

Counsel will prove that the U.S. Constitution's universal guarantee of life to "any person" does include the unborn.[25]

B. The U.S. Supreme Court and Leaders of the U.S. Government Maintain the *Roe v. Wade* Killings by Conspiring to Impose the Nazi Doctrines on the United States which the United States Itself Prosecuted as Extermination and Murder at Nuremberg.

By merely changing the names of the victims being killed, the U.S. Supreme Court has duplicated the crimes of "the supreme judge" of Nazi Germany.

At Nuremberg, the Nazi judges claimed they could not be found guilty of complicity in extermination and murder of millions of Jews and other minorities because "the supreme judge" of Nazi Germany had decreed those killings to be legal, and they were required to obey the decrees of "the supreme judge."[26]

Yet the United States prosecuted the Nazi judges and other justice officials for obeying the decrees of their supreme judge. And the Nuremberg Tribunal convicted them with the comment: "The dagger of the assassin was concealed beneath

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[24] *See* pages 11-20, *infra.*

[25] *Amicus Curiae* Brief by Legal Defense for Unborn Children at 1-7, filed herein and incorporated by reference.

[26] *United State v. Altstoetter, supra,* at 983-985, 1011, 1014.

the robe of the jurist."[27]

The record proves that the U.S. Supreme Court conspires to impose those same Nazi doctrines on America. The Court decreed killings to be "liberty" which the people had defined by their homicide statutes to be "murder."[28] The Court decreed mass murder to be legal, just as "the supreme judge" of Nazi Germany decreed mass murder to be legal. By merely changing the names of the victims, the Court has duplicated the decree of "the supreme judge" of Nazi Germany.

2.

The U.S. Supreme Court was accused in U.S. District Courts of extermination and mass murder on the grounds that Justices cannot lawfully decree extermination or murder to be legal. The U.S. Government defended its Justices by claiming that its Supreme Court must be obeyed "no matter how misguided" its decrees may appear to be. The U.S. Government expressly argued in open court that its Supreme Court must be obeyed even if it decrees the mass murder of Jews, or anyone else, to be liberty. An incredulous U.S. District Judge asked the U.S. Government:

> **[U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in *Roe v. Wade* took a discrete group of entities and said that these entities have no right to live, and thus may be killed.... And he said if you take *Roe v. Wade* and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said**

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[27] *United States v. Altstoetter*, *supra*, at 985.

[28] *Amicus Curiae* Brief By Legal Defense for Unborn Children, *supra* note 25, at 7-16.

"Jews." That is the one he used in his brief.

Would you argue stare decisis to me if, under *Roe v. Wade*, at the whim of neighbors Jews could be put to death?

[U.S. Government Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.[29]

Thus, while children were being killed in defiance of murder statutes, the U.S. Government defended its Justices accused of mass murder by claiming the same Nazi doctrines which the United States itself prosecuted as complicity in extermination and murder at Nuremberg.

It was undisputed that the U.S. Supreme Court decreed killings to be "liberty" which legislatures had defined to be "murder." It was undisputed that the victims were being killed in defiance of murder statutes. Yet the U.S. Government expressly claimed in open court that its Supreme Court must be obeyed even if it decreed the mass murder of Jews, or anyone else, to be liberty.

Although the U.S. District Judge objected that *Roe v. Wade* was "the worst decision by the Supreme Court in the history of the Court," he adopted the U.S. Government's arguments that he must obey the U.S. Supreme Court no matter whom it decreed a liberty to kill.[30]

3.

The petition for review of that decision filed in the U.S.

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[29] *Ernest v. United States Attorney for the Eastern District of Virginia and U.S. Attorney General*, U.S. District Court in Richmond, Civ. No. 84-0858, transcript of proceedings at 21-22, cert. denied 475 U.S. 1084 (1986).

[30] Petition for Cert. at A1, *Ernest v. United States Attorney for the Eastern District of Virginia and U.S. Attorney General*, cert. denied without comment, 475 U.S. 1084 (1986).

Supreme Court accused it of mass murder:

> For the **67th time**, the U.S. Supreme Court is accused in its own court with mass murder in violation of State and federal statutes.[31]

The U.S. Government waived its right to oppose the petition for review, and thus the U.S. Supreme Court was accused in its own Court of extermination and mass murder, and the accusations were unopposed. Yet the Court neither denied that it had decreed mass murder to be liberty, nor objected to the U.S. District Court's ruling that it must obey the U.S. Supreme Court even if it decreed the mass murder of Jews, or anyone else, to be liberty.

If any Justice had believed that the U.S. Supreme Court did not have the power to decree the mass murder of Jews or anyone else to be liberty, the Justice would certainly have noted his or her objection. But no such objection was noted.

This record proves a conspiracy by the executive and judicial departments of the government of the United States to impose the Nazi doctrines on the United States which the United States itself prosecuted as complicity in extermination and murder at Nuremberg. Only the names of the victims being killed have been changed.

4.

Moreover, each Justice of the U.S. Supreme Court was named as a defendant in a civil suit, and accused in a State court of extermination and mass murder on the grounds that Justices cannot lawfully decree extermination or murder to be liberty.[32] The State court was asked to "Declare that there was probable

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[31] *Id.*, at page 50. (emphasis in text).

[32] *Ernest v. Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc.; U.S. Attorney, etc.; U.S. Attorney General*, et al, in the Circuit Court of Fairfax, Virginia, Civil No. 90367.

cause to believe that the U.S. Supreme Court had conspired to commit murder" in violation of the State murder law.[33] Such a ruling could have been tantamount to the start of the criminal prosecution process against the Justices for extermination and mass murder.

History had never seen a moment when it was more imperative to meet the charges, and if possible, refute them. The charges were made in court, the place designated by law to hear such charges. The courthouse is the place where anyone, including the most powerful, can be summoned, confronted with the facts, and required to adequately explain, or face the consequences.

But the Justices did not deny that they had decreed killings to be "liberty" which that State had defined to be "murder." Nor did the Justices deny that under *Roe v. Wade*, victims were being killed in defiance of the State's murder statute. Nor did the Justices deny that they had been repeatedly accused of extermination and murder in the U.S. Supreme Court, but they had never attempted to refute the charges. Nor did the Justices deny that they were seeking to impose the Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg. To the contrary, this would be their defense.

The U.S. Government removed the case to the U.S. District Court in Alexandria.[34] Even though accused of extermination and mass murder, the Justices did not attempt to show one single allegation in the complaint to be wrong in fact or law. The record shows the charges to be true.

Rather each Justice, through his or her U.S. Government lawyer, claimed that all lower courts must obey the U.S.

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[33] Complaint, *supra* note 32, at page 44.

[34] *Ernest v. Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc.; U.S. Attorney, etc.; U.S. Attorney General*, in the U.S. District Court in Alexandria, Civil No. 89-732-A.

Supreme Court even if it decreed mass murder to be liberty.[35]

And the Justices also claimed that after the U.S. Supreme Court had decreed mass murder to be liberty, the victims being killed in defiance of murder statutes could not challenge the validity of its decree in any court.[36] The U.S. District Judge adopted the Justices' claims as law by summary decree, refusing to hold any hearings, and without showing any of the allegations in the complaint to be wrong in fact or law.

Thus, in defending themselves against accusations of extermination and mass murder, each Justice of the U.S. Supreme Court claimed the power to decree the mass murder of Jews, or anyone else, to be liberty. And this claim is now accepted by the government of the United States, - its courts, its Congress and its presidents, - as the supreme law of the land. This has been the steadfast policy of the U.S. Government, asserted in court after court, for over a quarter-century.[37]

All the lower federal judges who have upheld *Roe v. Wade*, and thus this Court's claim of power to decree murder and extermination to be liberty, are accused herein of complicity in extermination and mass murder.[38]

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[35] The Justices claimed that the District Court "is prohibited by stare decisis from granting the relief requested in this action." Although a trial court was asked to find probable cause that the Justices had conspired to commit mass murder, the Justices defended themselves by claiming "a precedent of the [U.S. Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Ernest v. Rehnquist, supra* note 32, Government's Memorandum in Support of Motion to Dismiss at 3.

[36] *Id.*, Government's Memorandum in Support of Motion to Dismiss at 4.

[37] Some of these cases are: U.S. District Court in Alexandria, Civ. No. 89-732; U.S. District Court in Salt Lake City, Civ. No. 85-0026; U.S. District Court in Richmond, Civ. No. 84-0858; U.S. District Court in Portland, Civ. No. 81-0272.

[38] *See* Ernest, supra n. 1, at 66 n. 31 for a partial list of federal judges accused of complicity in extermination and murder.

5.

The U.S. Government, under five Presidents, has invariably maintained its position that its Supreme Court has the power to decree the mass murder of Jews or anyone else to be legal.

For example, President Clinton was informed:

> The general rule is that mistake of law is no excuse for breaking the law. The narrow exception of reasonable reliance on an official judicial opinion, thereafter found to be a mistake of law, does not even apply in homicide cases.
>
> ....
>
> If the U.S. Government's claim [that its Supreme Court has the power to decree the mass murder of Jews or anyone to be liberty and such decrees must be obeyed as the supreme law of the land] turns out to be a mistake of law, and you refuse to repudiate it while victims are actually being killed in defiance of murder statutes, then your acquiescence can implicate you in a national scheme of mass murder. This letter becomes a part of the record of this case as evidence of what you knew, and when you knew it.[39]

Although Justices were being publicly accused of mass murder, and children were being killed in defiance of murder statutes, all the Presidents since 1975 have deliberately maintained the federal Government's claims that its Supreme Court has the power to decree the mass murder of Jews or anyone else to be legal, and everyone must obey.[40]

Thus five president have contributed to this giant conspiracy to kill victims in defiance of murder statutes, and to impose the Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg. A jury could find that this amounts to complicity in extermination

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[39] Letter to President Clinton dated March 31, 1993, certified no. P 867-382-498, received by the White House April 9, 1993.

[40] *See* Ernest, *supra* note 1, at 74-81.

and murder.

6.

Leaders of the U.S. Congress have also aided this conspiracy.[41] Congress has the constitutional duty to control the federal judiciary. But, as federal courts conspired to decree mass murder to be liberty, to kill children in defiance of murder statutes, and to impose Nazi doctrines on the United States, Congress defied its legal duty to control the federal judiciary.

Leaders of Congress, by acts of commission or omission, helped to maintain the *Roe v. Wade* killings.[42] But for these acts of commission or omission by members of Congress, Nazi doctrines could not have been imposed on America, and the killings could not have proceeded.

Since children are being killed in defiance of murder statutes and others criminal laws, because leaders of Congress refuse to do their constitutional and statutory duty to control the federal judiciary, a jury could find that those leaders of Congress are guilty of complicity in extermination and murder.

7.

A U.S. courthouse has become a place where officials conspire to commit extermination and murder, fabricate false

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[41] The Complaint, *supra* note 32, at p. 3, alleged that various members of the committees on the Judiciary, whose particular duty was to control the courts, were a part of the conspiracy: "The co-conspirators include ex-Chairman Peter Rodino, Chairman Rep. Jack Brooks, sub-committee chairman Rep. Don Edwards, sub-committee chairman Rep. Robert Kastenmeier; Chairman Sen. Joseph Biden, ex-Chairman Sen. Edward Kennedy. A jury could find this conspiracy to be murder." *See also* Ernest, *supra* note 1, at 82-103.

[42] When the U.S. Congress held hearings on *Roe v. Wade*, it conspired to allow all the false evidence in *Roe v. Wade* to be presented, but refused to allow the rebuttal to be presented. Thus Congress conspired to present false evidence to the nation as if it were the truth. And many leaders of Congress have publicly endorsed the *Roe v. Wade* killings. *See also* Ernest, *supra note* 1, at 82-103.

evidence to make their killings appear legal, and then maintain their killings decade after decade by conspiring to overthrow the U.S. Constitution.

8.

The evidence shows that federal judicial, executive and legislative officials have:

1. Conspired to claim the power to decree the extermination and murder of Jews, or anyone else, to be legal;

2. Conspired to kill victims in violation of criminal statutes, and, indeed, did actually kill tens of millions of innocent children in defiance of positive criminal statutes; and,

3. Conspired to maintain their killings by supplanting the U.S. Constitution as the supreme law of the land and imposing the Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg.

The human mind can neither imagine a plainer or bolder case of officials committing treason to the U.S. Constitution, nor find a more catastrophic crime in all the records of civilization. It teaches future generations that government is nothing more than the question of which mass murder can grab the power, issue the orders, and be blindly obeyed.

In 1858 an unknown lawyer named Abraham Lincoln accused the U.S. Supreme Court, two U.S. Presidents, and leaders of the U.S. Congress of conspiring to overthrow the U.S. Constitution, and to impose a slave empire on America.

In 1998 a book set out the evidence presented in this application, and asked:

Has the U.S. Supreme Court committed mass murder?
Have four U.S. Presidents committed mass murder?

Have leaders of the U.S. Congress committed mass murder?

These questions are now before the public, and counsel submits that the search for truth will surely continue until these questions are correctly answered.

CONCLUSION

The Court is moved to allow counsel Alan Ernest to represent the unborn and defend their right to life under the U.S. Constitution, and to prove that the Constitution's guarantee of life to "any person," as used in the Fifth and Fourteenth Amendments, does include the unborn. Both the State and federal governments have a duty to protect unborn life.

Alan Ernest
Counsel

(19)

No. 04-1144

OFFICE OF THE CLERK

In The
Supreme Court of the United States

KELLY A. AYOTTE,
ATTORNEY GENERAL OF NEW HAMPSHIRE,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICI CURIAE* OF AMERICAN ASSOCIATION OF PRO LIFE OBSTETRICIANS AND GYNECOLOGISTS, CHRISTIAN MEDICAL ASSOCIATION, CATHOLIC MEDICAL ASSOCIATION, ALLIANCE DEFENSE FUND, NATIONAL ASSOCIATION OF EVANGELICALS, CONCERNED WOMEN FOR AMERICA AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONER

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H.L. v. Matheson, 450 U.S. 398 (1981) 22

Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990) 22-23

Planned Parenthood of Northern New England v. Heed, 390 F.3d (1st Cir. 2004) ..... *passim*

Planned Parenthood of Northern New England v. Heed, 296 F.Supp.2d 56 (D. N.H. 2003) ..... *passim*

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 5

Stenberg v. Carhart, 530 U.S. 914 (2000) 5

Thornburgh v. Amer. College of Obstet. & Gyn., 476 U.S. 747 (1986) 21

Vacco v. Quill, 521 U.S. 793 (1997) 2

Washington v. Glucksberg, 521 U.S. 702 (1997) 2

CONSTITUTIONAL AND STATUTORY PROVISIONS

N. H. REV. STAT. ANN. § 132:24-28 (2003) 4-5

MEDICAL AUTHORITIES

Anderson, *Comprehensive Management of the Pregnant Teen-ager*, 7 CONTEMPORARY OB/GYN 75 (1976) 7

Atrash H.K., *et al.*, *Maternal and Perinatal Mortality*, 4 CURR. OPIN. OBSTET. GYNECOL. 61 (1992) 7

Briggs, Herren, et. al., *Pregnancy in the Young Adolescent*, 84 AM. J. OBSTET. GYNECOL. 436 (1962) 7

Bulfin, *A New Problem in Adolescent Gynecology*, 72 SOUTHERN MED. J. 967-968 (Aug. 1979) 8

Cates, Willard, Centers for Disease Control, Interview in *The Washington Post*, February 16, 1978 21

Centers for Disease Control, *Morbidity and Mortality Weekly Report*, Vol. 28, No. 4, Feb 2, 1979 21

Clark, Wong, *et al.*, *The Pregnant Adolescent*, 142 ANN. N.Y. ACAD. SCI. 813 (1970) 7

Critical Care Obstetrics (Gary A. Dildy III, *et al.*, eds., The McGraw-Hill Companies, Inc., New York 2003) ..... *passim*

Donald, Ian, *Practical Obstetric Problems* 169-170 (Lippincott Williams & Wilkins 1979) 13

Dott and Fort, *Medical and Social Factors Affecting Early Teenage Pregnancy*, 125 AM. J. OBSTET. GYN-ECOL. 532 (1976) 7

Dwyer, *Managing the Teenage Pregnancy*, 12 OB-GYN OBSERVER 2 (1975) 7

Elkayam, U., *et al.*, *Cardiovascular Problems in Pregnant Women with the Marfan Syndrome*, 123 ANN. INTERN. MED. 117 (1995) 17

Goodwin, T. Murphy, *Medicalizing Abortion Decisions*, 61 FIRST THINGS 33-36 (March 1996) 11

Houde and Conway, *Teen-age Mothers: a Clinical Profile*, 7 CONTEMPORARY OB/GYN 71 (1976) 7

Israel and Woutersz, *Teenage Obstetrics*, 85 AM. J. OBSTET. GYNECOL. 869 (1963) 7

Mayo Clinic Internal Medicine Board Review 2002-2003 553 (Thomas M. Habermann, M.D., ed., Lipincott, Williams and Wilkins Publishers 2002-2003 9

Medical Complications During Pregnancy (Gerald N. Burrow, *et al.*, eds., Elsevier Saunders 2004 ..... *passim*

Medical Knowledge Self-Assessment Program (Paul E. Epstein, *et al.*, eds., Cardiovascular Medicine American College of Physicians 2003) ..... *passim*

Pettiti and Cates, *Restricting Medicaid Funds: Projection of Excess Mortality*, 67 AMER. J. PUB. HEALTH 860-62 (Sept. 1977) 21

Mitchell, John J., *The Natural Limitations of Youth: the Predispositions that Shape the Adolescent Character* (Ablex

Pub. Co., Stamford, CT 1998) 9

Pregnancy Related Mortality Surveillance – United States, 1991-1999 (Morbidity and Mortality Weekly Report, Centers for Disease Control and Prevention February 21, 2003), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5202a1.htm 19

Sarrel and Klerman, *The Young Unwed Mother*, 105 AM. J. OBSTET. GYNECOL. 575 (1969) 7

Saul, Rebekah, "Abortion Reporting in the United States: An Examination of the Federal-State Partnership," in *Family Planning Perspectives*, Vol. 30, Number 5, Sept./Oct. 1998 20-21

Webb, Briggs, Brown, *A Comprehensive Adolescent Maternity Program in a Community Hospital*, 84 AM. J. OBSTET. GYNECOL. 442 (1962) 7

Zaeckler, Adelman, *et al.*, *The Young Adolescent as an Obstetrical Risk*, 103 AM. J. OBSTET. GYNECOL. 305 (1969) 7

OTHER AUTHORITIES

Epoprostenol (Systemic) (MedlinePlus 2005), http://www.nlm.nih.gov/medlineplus/druginfo/uspdi/203429.htm 12

Planned Parenthood of New England 2005, http://www.ppnne.org/site/PhotoAlbum%20User?view=UserPhotoDetail&PhotoID=68499&position=3&AlbumID=7 16

STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

American Association of Pro Life Obstetricians and Gynecologists ("AAPLOG") is a national organization of over 2,500 obstetricians and gynecologists who reaffirm the unique value and dignity of individual human life in all stages of growth and development from conception onward.

The Christian Medical Association ("CMA") was founded in 1931 and today represents over 16,000 members—primarily practicing physicians representing the entire range of medical specialties. These members, who include physicians licensed to practice in the State of New Hampshire, share a common commitment to the principles of biblical faith and the integration of those principles with professional practice. Among other functions, the CMA Medical Ethics Commission coordinates member experts in the field of medical ethics who formulate positions on vital issues. These positions are subsequently voted upon for adoption, amendment, or rejection by over 100 elected representatives to the national convention of the Association. CMA's members have an interest in the case before the Court because it raises the prospect of a constitutional rule that may result in poorer access to family support structures necessary for providing medical care in the best interests of their patients.

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[1] *Amici curiae* file this brief by consent of the parties, and copies of the letters of consent are on file with the Clerk of the Court. Counsel for *Amici* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their supporters, or their counsel, has made a monetary contribution to the preparation or submission of this brief. *Amici* wish to gratefully acknowledge the contributions of Steven R. Zielinski, M.D., J.D., who served as principal medical consultant for this brief.

The Catholic Medical Association is a professional association of American and Canadian physicians, who seek to respond to the unique responsibility which belongs to all health-care personnel as guardians and servants of human life and human dignity. Its members are conscious of the fact that their patients entrust themselves to the knowledge acquired by physicians. This suggests an important tension. As John Paul, II noted in *On Faith and Reason*, "On the one hand, the knowledge acquired through belief can seem an imperfect form of knowledge, to be perfected gradually through personal accumulation of evidence; on the other hand, belief is often humanly richer than mere evidence, because it involves an interpersonal relationship and brings into play not only a person's capacity to know but also the deeper capacity to entrust oneself to others...." This capacity to entrust oneself to others lies at the heart of the patient-physician relationship, and at the heart of this case. The Catholic Medical Association has an interest in assisting the Court in properly understanding that relationship.

Alliance Defense Fund ("ADF") is a not-for-profit public interest organization that provides strategic planning, funding, and training to attorneys and organizations to reform American law so that all human life will be respected and protected from conception to death. Its membership includes hundreds of lawyers and numerous public interest law firms. ADF has advocated for the rights of Americans in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 cases and legal matters, including cases before this Court regarding life issues such as *Vacco v. Quill,* 521 U.S. 793 (1997), and *Washington v. Glucksberg,* 521 U.S. 702 (1997).

The National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, local churches, para-church organizations, and individuals, and includes more than 50,000 local churches from 51 denominations, as well as over 250 other religious ministries. NAE serves a constituency of over 30 million people. The Association believes that human life is sacred, that civil government has no higher duty than to protect human life, and the duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

Concerned Women for America ("CWA") is the nation's largest public policy organization for women. Located in Washington, D.C., CWA is a non-profit organization that provides policy analysis to Congress, state and local legislatures and assistance to pro-family organizations through research papers and publications. CWA seeks to inform the news media, academic community, business leaders and the general public about marriage, family, cultural and constitutional issues that affect the nation. CWA has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts and state courts.

CWA's vision statement calls for women and like-minded men to come together to restore the family to its traditional purpose because this allows each family member to realize their God-given potential and be more responsible citizens. The inalienable right to life documented in the Declaration of Independence and shored up by strong families is a touchstone of liberty. CWA's defense of minors' ability to rely on the protection and wisdom of their parents is a long-standing part of CWA's educational and grassroots efforts.

The Christian Legal Society ("CLS"), founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and most law schools. Since 1975, the Society's legal advocacy division, the Center for Law and Religious Freedom, has worked for the protection of human life from conception to natural death.

SUMMARY OF ARGUMENT

In imposing a constitutional standard for parental notice statutes that mandates a broadly interpreted "health" exception, the Circuit Court of Appeals has relied precipitously upon the testimony of one physician-Plaintiff in the case. The Court's *Amici* seek to bring to the Court's attention supplemental medical authority that suggests that none of the acute medical complications of pregnancy cited by the Court of Appeals or Respondents and their *amici* necessarily mandates immediate termination of pregnancy by abortion as the accepted standard of practice. Moreover, Respondents' assertion that abortion is a relatively "safe" medical procedure relies upon maternal mortality data that is unintended for that purpose and unsuitable to it.

ARGUMENT

i. INTRODUCTION.

In 2003, the New Hampshire legislature enacted the "Parental Notification Prior to Abortion Act" to require parental notification before abortions may be performed on unemancipated minors. 2003 N.H. LAWS 173, codified at N.H. REV. STAT. ANN. ("RSA") § 132:24-28 (2003); *see Planned Parenthood of Northern New England v. Heed*, 390

F.3d 53, 55 (1st Cir. 2004). The Act provides:

> No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

RSA 132:25; 390 F.3d at 55. Written notice must be addressed to the parent at the usual place of residence; notification by certified mail is permitted. *Id.* However, notice is not required in the fashion provided by the statute if the person entitled to notice certifies they have received it, or if the physician certifies that abortion is necessary to prevent the minor's death and there is insufficient time to provide the requisite notice. RSA 132:26; 390 F.3d at 55.

The District Court held the Act facially invalid pursuant to this Court's decisions in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) and *Stenberg v. Carhart*, 530 U.S. 914 (2000). 390 F.3d at 56-57; *Planned Parenthood of Northern New England v. Heed*, 296 F. Supp.2d 59, 64-65 (D. N.H. 2003). The District Court found the Act unconstitutional due to the lack of an explicit exception to protect the health of the minor and the narrowness of the Act's exception for abortions necessary to prevent the minor's death. 390 F.3d at 56-57; 296 F.Supp.2d at 65 (health exception) and 67 (death exception). The lower court relied upon the affidavit of the only physician plaintiff in the case, Dr. Wayne Goldner, who listed five specific conditions that, in his view, could require abortion to protect a minor's health. 390 F.3d at 56, n.2; 296 F. Supp.2d at 56. Although the District Court did not discuss these conditions

in its opinion, they were cited by the Court of Appeals as examples of medical conditions that may require an abortion to preserve a minor's health:

> Dr. Wayne Goldner listed in his unopposed declaration five specific conditions that could require abortion to protect a minor's health: pre-eclampsia, eclampsia, premature rupture of the membranes surrounding the fetus, spontaneous chorioamnionitis, and heavy bleeding during pregnancy.

390 F.3d 53, 56, n.2. The Court's *Amici*, who include thousands of obstetricians, gynecologists, surgeons and internal physicians, respectfully take issue with the courts' reliance upon Dr. Goldner's assertions. In the case of each of these pregnancy complications, as well as in the case of most if not all other recognized complications, immediate termination by abortion is not only not indicated, in many cases it is actually contraindicated. *See* Appendix A to Brief of *Amici* ("Comparison Chart: Pregnancy Complications and Treatments"). *Amici* submit that the medical-legal issue for the Court to consider in the circumstances contemplated by the New Hampshire parental notification act is not whether a particular complication may necessitate consideration of termination as a therapeutic response generally, but whether Respondents have adequately demonstrated (primarily through Dr. Goldner's assertions) that immediate termination within 48 hours in the primary clinical setting of Respondent women's health centers is indicated for such complications. In *Amici*'s view, accepted medical authority directly contradicts Respondent's position.

I. NEW HAMPSHIRE'S PARENTAL NOTIFICATION LAW WILL NOT INCREASE MATERNAL MORBIDITY AND MORTALITY AMONG THE STATE'S TEENAGERS.

Teenage pregnancy, while not desirable, does not result in excess maternal mortality provided the mother receives proper prenatal care. Numerous studies support the value of proper prenatal care as essential to the well-being of the adolescent mother and child.[2] "Women without any prenatal care were almost twofold at increased risk for maternal death

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[2] The quantity and quality of prenatal care have a direct and significant effect on the pregnant woman and her offspring. The most striking examples of the value of prenatal care occur in teenage pregnancies. The unique medical problems of the pregnant teenager can be controlled and the results of proper prenatal care prove to be no different from that in the general population. Israel and Woutersz, *Teenage Obstetrics*, 85 AM. J. OBSTET. GYNECOL. 869 (1963); Anderson, *Comprehensive Management of the Pregnant Teen-ager*, 7 CONTEMPORARY OB/GYN 75 (1976); Briggs, Herren, *et. al.*, *Pregnancy in the Young Adolescent*, 84 AM. J. OBSTET. GYNECOL. 436 (1962); Dwyer, *Managing the Teenage Pregnancy*, 12 OB-GYN OBSERVER 2 (1975); Webb, Briggs, Brown, *A Comprehensive Adolescent Maternity Program in a Community Hospital*, 84 AM. J. OBSTET. GYNECOL. 442 (1962); Houde and Conway, *Teen-age Mothers: a Clinical Profile*, 7 CONTEMPORARY OB/GYN 71 (1976); Sarrel and Klerman, *The Young Unwed Mother*, 105 AM. J. OBSTET. GYNECOL. 575 (1969); Dott and Fort, *Medical and Social Factors Affecting Early Teenage Pregnancy*, 125 AM. J. OBSTET. GYN-ECOL. 532 (1976); Clark, Wong, *et al.*, *The Pregnant Adolescent*, 142 ANN. N.Y. ACAD. SCI. 813 (1970); Zaeckler, Adelman, *et al.*, *The Young Adolescent as an Obstetrical Risk*, 103 AM. J. OBSTET. GYNECOL. 305 (1969). These results show the benefits of proper pre-natal care for the pregnant teenager. There are no studies indicating any medical benefits of abortion for the pregnant teenager, nor is abortion recommended as the form of treatment. Many health problems prevalent among teenagers can be diagnosed and treated concurrently with pregnancy; such treatment may not occur should the patient choose abortion.

relative to those who received prenatal care."[3] Nothing in the growth or physiology of an adolescent specifically contraindicates pregnancy.[4] In fact, the opposite is true, as "women aged 35-39 years carry a 2.6-fold increased risk of maternal death and those ≥40 years have a 5.9 fold increased risk."[5] This is reflected in New Hampshire's own recent experience; State Health Department statistics demonstrate that for the period 1999 to 2002, New Hampshire has recorded no deaths due to pregnancy, childbirth and the puerperium for patients under 22 years of age. *See* Appendix B, Health Statistics and Data Management Section of the Bureau of Disease Control and Health Statistics, Department of Health and Human Services, Table, *NH Female Leading Causes of Deaths from 1999 to 2002*.

Physicians have long known that an excessive reliance on abortion as a treatment for adolescent pregnancy was unfounded. The Court should be extremely wary of abortion as a treatment for the health problems of teenagers since severe, long-term complications and handicaps have developed due to such abortions.[6] Further, since an individual's first pregnancy may also be her only one and existing health problems in an adolescent only tend to worsen over time,[7] an adolescent should not be hastily

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[3] Dildy, G. (Ed.), *et al.*, CRITICAL CARE OBSTETRICS 6 (4th ed. 2003), citing Atrash, H.K., *et al.*, *Maternal and Perinatal Mortality*, 4 CURR. OP. OBSTET. GYNECOL. 61 (1992).

[4] Seeley, *et al.*, ANATOMY AND PHYSIOLOGY 937-955 (5th ed. 2000).

[5] CRITICAL CARE OBSTETRICS at 6.

[6] Bulfin, *A New Problem in Adolescent Gynecology*, 72 SOUTHERN MED. J. 967-968 (Aug. 1979).

[7] Most constitutional illnesses, *e.g.*, diabetes, hypertensive and vascular disorders, rheumatological disorders and genetic disorders tend to worsen an individual's health over time. *See*

rushed into an abortion when future child bearing may be placed at greater risk. As adolescents are not fully developed with regard to future planning and risk assessment,[8] parental notification, knowledge and involvement are essential to ensure positive overall outcomes.

II. MEDICAL COMPLICATIONS OF PREGNANCY DO NOT REQUIRE ABORTION AS A TREATMENT IN THE CIRCUMSTANCES CONTEMPLATED BY THE NEW HAMPSHIRE STATUTE.

Respondents evidence a fundamental misunderstanding of the proper role of the physician in the care of the high risk pregnant adolescent. Proper medical care mandates evaluation and diagnosis prior to undertaking life altering surgical procedures. Such action is not only prudent from the medical perspective, it is essential in the context of induced abortion, since the pregnant adolescent is likely to be at risk in any future pregnancies and the best opportunity to have offspring might be her first and only pregnancy.

All of the potentially catastrophic medical conditions cited by opponents would also mandate care in an advanced medical facility. Specialized units have been developed for the provision of such care.[9] Such care would, of necessity, go beyond the immediate abortion procedure and would likely involve complex decision-making. Prudent medical care and planning would therefore consistently involve parental involvement and consultation, if not outright

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generally Habermann, T. (Ed. in Chief), MAYO CLINIC INTERNAL MEDICINE BOARD REVIEW 2002-2003.

[8] See generally John J. Mitchell, THE NATURAL LIMITATIONS OF YOUTH: THE PREDISPOSITIONS THAT SHAPE THE ADOLESCENT CHARACTER (Ablex Pub. Co. 1998).

[9] CRITICAL CARE OBSTETRICS at 13-16.

consent. Encouraging parental knowledge and involvement at the earliest opportunity would serve to protect the adolescent in difficult circumstances, particularly when the adolescent cannot advocate for herself.[10]

The Court's *Amici* believe that the litany of complex medical complications of pregnancy cited as necessitating a health exception, including Eisenmenger's Syndrome,[11] Pulmonary Hypertension, Pre-Eclampsia/Eclampsia, Premature Rupture of the Membranes/Chorioamnionitis, Placenta Previa and Abruptio Placenta, and Marfan's Syndrome,12 do not necessarily warrant immediate abortion as the primary therapeutic response, for the reasons discussed herein.

Eisenmenger's Syndrome is a form of cyanotic heart disease which involves severe pulmonary hypertension originating from a left to right shunting of blood.[13] As the pulmonary hypertension worsens, the shunt reverses, forcing unoxygenated blood to bypass the heart. While Eisenmenger's Syndrome is considered a contraindication to

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[10] The confidentiality advocated by Respondents is designed to keep the information *only* from the parent. Since pregnancy in an otherwise unemancipated adolescent raises at least the question of statutory rape or child sexual abuse, the unnecessary allegiance to confidentiality may only serve to maintain the adolescent in an abusive situation or allow others with knowledge of the adolescent's history to use the threat of exposure for continued coercion or abuse.

[11] *See* Brief *Amici Curiae* of Society for Adolescent Medicine, *et al.*, in Support of Appellees at 11.

[12] *Id.*

[13] Atrial septal defect, ventricular septal defect and patent ductus arteriosis can all be sources of the original left-to-right shunt. Epstein, P. (Ed. in Chief) and Foster, E. (Ed.), MEDICAL KNOWLEDGE SELF-ASSESSMENT PROGRAM 89 (13th ed. 2003).

pregnancy and some authorities might advocate termination early in a pregnancy, nothing in the medical literature requires emergent or even urgent termination. The vast majority of deaths occur peri-partum (*i.e.*, during delivery) and post-partum.

The accepted treatment for Eisenmenger's Syndrome in pregnancy is supplemental oxygen, bed rest, early hospitalization with close hospital monitoring, decreased cardiac workload and maintenance of venous return, appropriate vascular volume and right ventricular filling.[14] In fact, some studies indicate increased maternal mortality with surgical intervention in the latter half of pregnancy compared to vaginal delivery.[15]

Several points regarding Eisenmenger's Syndrome are important to consider. First, the occurrence of late stage Eisenmenger's Syndrome with significant pulmonary hypertension in the adolescent population is extremely rare. Eisenmenger's syndrome does not develop spontaneously. "Over many years, the prolonged presence of high flow and pressure in the pulmonary arteries causes the pulmonary vessels to constrict and thicken."[16] "[T]hese are exceedingly rare conditions."[17]

Second, hormonal changes secondary to pregnancy may provide some protective effect by decreasing pulmonary

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[14] Burrow, *et al.* (Eds.), MEDICAL COMPLICATIONS DURING PREGNANCY 110-111 (6th ed. 2004); CRITICAL CARE OBSTETRICS at 257.

[15] CRITICAL CARE OBSTETRICS at 257.

[16] http://tchin.org/resource_room/c_art_06.htm (emphasis added).

[17] T. Murphy Goodwin, M.D., *Medicalizing Abortion Decisions*, 61 FIRST THINGS 33-36 (March 1996).

vascular resistance.[18] The loss of these protective hormones by surgical abortion may have significant adverse consequences.

Third, since the vast majority of complications are peri- and post partum, the existence of Eisenmenger's Syndrome is highly unlikely to produce adverse health consequences during the period when parental notification, under the New Hampshire law, will be at issue.

Fourth, no responsible physician would undertake the care of a pregnant Eisenmenger's patient, whether for surgical abortion or delivery, outside of the hospital setting. For an adolescent patient, close contact and consultation with the parents or other responsible guardian would be essential for appropriate immediate treatment, case management and follow-up care.

Finally, delivery of an adolescent mother, while problematic, may be preferable from a health standpoint compared to the risk of a later pregnancy which is likely to occur in the same mother only with a worsened cardiovascular status. Complex decisions regarding potential termination in a setting where future pregnancy is contraindicated are best done in a careful, well planned manner with appropriate familial and medical support. The New Hampshire law is consistent with such appropriate parental involvement.

Pulmonary Hypertension in pregnancy carries with it similar concerns to those noted for Eisenmenger's Syndrome. Recent medical advances (*e.g.*, epoprostenol,[19]

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[18] CRITICAL CARE OBSTETRICS at 257.

[19] *See generally* http://www.nlm.nih.gov/medlineplus/druginfo/uspdi/203429.html.

inhaled nitric oxide[20]) may prove beneficial in decreasing morbidity and mortality in these patients regardless of the planned clinical outcome. For both Eisenmenger's Syndrome and Pulmonary Hypertension, appropriate clinical evaluation and initial stabilization therapy will provide more than ample time for either parental notification or judicial bypass.

Cardiac surgery during pregnancy is not absolutely contraindicated, but should be optimized as to time, place, gestation and level of care.[21] However, surgical abortion as a treatment for certain cardiovascular conditions, such as congestive heart failure, has long been known to carry severe inherent risks:

> *For the patient who is not in cardiac failure there is no need to terminate* and if she is in failure termination is next door to manslaughter . . .
>
> *On no account may obstetrical intervention be undertaken until the patient's cardiac failure is under control*, although the situation may seem so grim that one may be tempted to interfere. To do so would simply seal the patient's fate. *Once failure has been controlled, however, the need to intervene in the pregnancy has passed.*[22]

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[20] CRITICAL CARE OBSTETRICS at 258.

[21] MEDICAL KNOWLEDGE SELF-ASSESSMENT PROGRAM at 96-97. For peripartum cardiomyopathy, "Treatment is supportive and includes standard treatment for congestive heart failure." MEDICAL KNOWLEDGE SELF-ASSESSMENT PROGRAM at 100. *See generally id.*, at 99 (discussing benefits and risks of continuing or interrupting pregnancy in cardiac patients).

[22] Donald, I., PRACTICAL OBSTETRIC PROBLEMS 169-170 (5th ed. 1979) (emphases added).

Pre-eclampsia is a disease unique to pregnancy and pregnancy related conditions.[23] Pre-eclampsia is defined as maternal hypertension, proteinuria and edema beginning after the 20th week of gestation.[24] Optimal treatment consists of bed rest, blood pressure monitoring and control, regulation of fluid intake and output, close hospital monitoring and medication for neurologic indications.[25] Treatment for pre-eclampsia has been fairly standardized for decades,[26] and newer anti-hypertensive medications have improved treatment and control.[27] Early delivery, not necessarily abortion, is considered if the condition worsens *after* attempts at medical control.[28]

While some authorities advocate outpatient monitoring and expectant management for pre-eclampsia,[29] such care is not likely to be appropriate in the setting of adolescent pregnancy, particularly in the absence of parental notice and

[23] MEDICAL COMPLICATIONS DURING PREGNANCY at 45. Eclampsia, which involves maternal seizures in the setting of pre-eclampsia, is included here. "The incidence of eclampsia has declined since the 1920s, largely because of the greater availability of prenatal care." MEDICAL COMPLICATIONS DURING PREGNANCY at 46.

[24] MEDICAL COMPLICATIONS DURING PREGNANCY at 45-47.

[25] MEDICAL COMPLICATIONS DURING PREGNANCY 54-56; CRITICAL CARE OBSTETRICS at 438.

[26] CRITICAL CARE OBSTETRICS at 438-39; MAYO CLINIC INTERNAL MEDICINE BOARD REVIEW 2002-2003 at 553.

[27] CRITICAL CARE OBSTETRICS at 441-444.

[28] "When severe pre-eclampsia is diagnosed, immediate delivery, regardless of gestational age, has generally been recommended." National High Blood Pressure Education Program Working Group (1990), quoted in CRITICAL CARE OBSTETRICS at 438.

[29] *E.g.*, CRITICAL CARE OBSTETRICS at 438-439.

involvement.[30] It would be difficult, if not impossible, to imagine a situation where the adolescent would receive appropriate medical management in a suitable clinical setting,[31] regardless of the intended pregnancy outcome, without parental notice and parental involvement. Further, the health risks and concerns for the adolescent do not terminate merely because the pregnancy does[32] and follow-up in a supportive environment would be essential to prevent any late complications.

Placenta Abruptio and *Placenta Previa* are conditions that often present with significant vaginal hemorrhage. Placental abruption is defined as the premature separation of a normally situated placenta, and may be partial or complete.[33] In *placenta previa*, a portion of the placenta may partially or completely cover the internal cervical os.[34] In the setting of vaginal blood loss, appropriate initial management includes bed rest, close hospital monitoring, fluid resuscitation, and transfusion as needed. "Resuscitation with fluid, blood, and correction of coagulopathy must be urgently undertaken, and invasive monitoring may be necessary."[35] Should the clinical condition of the mother permit, ultrasound evaluation and testing for pregnancy

[30] MEDICAL COMPLICATIONS DURING PREGNANCY at 55. Optimal outpatient management would include twice weekly fetal monitoring, ultrasound evaluations and frequent laboratory and clinical evaluations.

[31] *See* CRITICAL CARE OBSTETRICS at 438-439 ("...intensive maternal and fetal monitoring in a tertiary care center").

[32] MEDICAL COMPLICATIONS DURING PREGNANCY at 56 ("Late postpartum eclampsia has also been observed, the seizures occurring after the first postpartum week.").

[33] CRITICAL CARE OBSTETRICS at 298.

[34] ANATOMY AND PHYSIOLOGY at 964.

[35] CRITICAL CARE OBSTETRICS at 298.

viability may be considered. But the appropriate treatment is *not* abortion, since "...prompt delivery prevents further decompensation of both mother and fetus."[36] "If the fetus is alive and of viable gestational age at presentation, urgent delivery by caesarean section is indicated unless vaginal delivery is imminent."[37]

To undertake such care in anything less than a full service hospital would be risky. To undertake such care in a free-standing clinic or with mid-level health practitioners would be unthinkable.[38] Parental notification can be easily accomplished as part of transfer to an appropriate medical care facility or during the period of stabilization at that facility. Parental consultation may be essential, since the distressed adolescent may be unable to advocate for herself or provide for the needs of her newborn.

Premature Rupture of Membranes surrounding the unborn child may lead to an infectious condition known as Chorioamnionitis. Most infections are caused by bacteria in the cervical and vaginal flora.[39] Treatment requires prompt administration of antibiotics and delivery.[40] Since the required antibiotics are administered intravenously and would be required regardless of intended pregnancy outcome, hospitalization, monitoring of drug levels and close

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[36] CRITICAL CARE OBSTETRICS at 298.

[37] CRITICAL CARE OBSTETRICS at 298.

[38] *Amici* note with concern that Respondent Planned Parenthood of Northern New England admits that "Using mid-level practitioners reduces costs for patients and enables us to reach more women." http://www.ppnne.org/site/PhotoAlbumUser?view=UserPhotoDetail&PhotoID=68499&position=3&AlbumID=7528 (last viewed 08/06/05).

[39] MEDICAL COMPLICATIONS DURING PREGNANCY at 314.

[40] MEDICAL COMPLICATIONS DURING PREGNANCY at 315.

observation are mandatory.[41] As noted throughout this brief, parental notification, consultation and support would be essential to a positive outcome for the adolescent.

Marfan's Syndrome is an autosomal dominant genetic disease that produces abnormalities in connective tissue. Individuals with Marfan's Syndrome are at risk for aortic dissection and other cardiovascular complications.

> Pregnancy should be discouraged in these individuals. Maternal activity should be limited, and prophylactic B-adrenergic blocking therapy should be applied during pregnancy. Ideal monitoring includes blood pressure analysis and serial echocardiographic studies. If there is progressive aortic root dilation or if the aortic root diameter exceeds 5.5 cm, necessary surgical repair can be carried out during pregnancy with good outcomes.[42]

Cesarean section is advised in certain circumstances.[43]

In summary, pregnancy complications in the adolescent do not require a rush to abortion. Prudent medical management requires an appropriate evaluation and an effort at stabilization which would allow for beneficial parental notification and involvement. *See* Appendix A to Brief of *Amici* ("Comparison Chart: Pregnancy Complications and Treatments").

III. STATISTICAL COMPARISONS OF ABORTION RISKS

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[41] *Id.*

[42] MEDICAL COMPLICATIONS DURING PREGNANCY at 112, citing Elkayam, U., *et al.*, *Cardiovascular Problems in Pregnant Women with the Marfan Syndrome*, 123 ANN. INTERN. MED. 117 (1995).

[43] *Id.*

AND MATERNAL MORTALITY RISKS MAY GIVE A FALSE IMPRESSION OF ABORTION SAFETY.

Respondents urge that abortion is "an extremely safe medical procedure." Declaration of Wayne Goldner 2, ¶ 3. Dr. Goldner claimed in the District Court that "Both in terms of mortality (death) and morbidity (serious complications short of death) abortion is many times safer than continuing pregnancy through to childbirth." *Id.* Complaint at 7. However, this argument depends upon a fallacious comparison of maternal mortality and live birth data. While defining maternal mortality relative to live births may be statistically convenient, it improperly represents the true population at risk while including deaths from unrelated groups. According to the Centers for Disease Control and Prevention,

> The maternal mortality rate is computed as all maternal deaths per 100,000 live births. In contrast, the measure used for abortions is a case-fatality rate which is computed per 100,000 abortions. These measures are conceptually different and used by CDC for different public health purposes.

Appendix C, Letter of July 20, 2004 from Julie L. Gerberding, M.D., M.P.H., Director, to Walter M. Weber, American Center for Law & Justice, p. 1.

Moreover, the Maternal Mortality Rate (MMR) is commonly defined as the Total Maternal Deaths (TMD) divided by the number of Live Births (LB). Each component suffers from multiple defects that make the overall MMR an inappropriate means for comparison to the Abortion Mortality Rate (AMR).

First, the TMD is defined as all deaths attributable to pregnant women during the period of their pregnancy and for a year after delivery.[44] Such deaths might occur in women of all races,[45] across the entire age range in which pregnancy can occur,[46] in all states of underlying health conditions,[47] by all causes[48] and without regard to whether or not the woman is under a physician's care. Each element noted above has implications that make the TMD number increase, thereby increasing the MMR, but which are not considerations as likely to occur in a population of women seeking abortion. Women seeking induced abortions tend to be younger, healthier, from favorable socioeconomic circumstances, of white (Caucasian) race and all, by definition, are under a physician's care. Those with underlying medical conditions who succumb, in whole or in part, to the stresses of an induced abortion procedure, may have their deaths attributed to the underlying medical condition or a subsequent condition which developed, rather than the abortion procedure.[49] Being under a physician's care during a pregnancy has been shown to be a significant factor in the

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[44] Centers for Disease Control and Prevention, *Pregnancy Related Mortality Surveillance – United States, 1991-1999* (MMWR), February 21, 2003, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5202a1.htm.

[45] Minorities are more commonly represented in the population of women continuing their pregnancies and have poorer outcomes. CRITICAL CARE OBSTETRICS at 4 ("Black maternal race confers a relative risk of 3.7 fold for maternal death compared to White women."); CRITICAL CARE OBSTETRICS at 6.

[46] *Id.* ("women aged 35-39 years carry a 2.6-fold increased risk of maternal death and those ≥40 years have a 5.9 fold increased risk").

[47] *See generally* MEDICAL COMPLICATIONS DURING PREGNANCY; CRITICAL CARE OBSTETRICS.

[48] CRITICAL CARE OBSTETRICS at 6.

[49] CRITICAL CARE OBSTETRICS at 6.

prevention of maternal mortality.[50]

Second, the calculation of MMR based on the number of live births falsely underestimates the population of women who are at risk for the complications of pregnancy either wholly or in part. Women who experience miscarriages, stillbirths, pre-partum intrauterine deaths and deaths from other causes may be added to the TMD without ever having the likelihood of a live birth.

Confidentiality issues also impact the accuracy of reporting of maternal deaths, since a pregnant or recently pregnant woman may have the evidence of her pregnancy objectively determined, but whether her abortion is natural or induced cannot so easily be assumed. Many women withhold the fact of their induced abortion. Should such women suffer severe morbidity or mortality, prior to disclosure, their deaths might be attributed to complications of pregnancy instead of the true cause, which is induced abortion.[51] Further, confidentiality issues preclude the proper and objective collection and interpretation of morbidity and mortality data in induced abortion.[52] While

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[50] *Id.* ("Women without any prenatal care were almost twofold at increased risk for maternal death relative to those who received prenatal care.").

[51] *Id.* ("...infections were the leading cause of abortion related maternal deaths").

[52] In fact, New Hampshire is one of only 5 states that do not mandate abortion providers to submit epidemiologically valuable reports relative to abortion and, of course, its complications. Planned Parenthood, among other organizations, has opposed efforts by the New Hampshire State Department of Health and Human Services to require abortion providers to report such data. Saul, Rebekah, "Abortion Reporting in the United States: An Examination of the Federal-State Partnership," in *Family Planning*

maternal deaths, whether from pregnancy or induced abortion, generally occur in the hospital setting, induced abortions are performed in freestanding clinics not subject to reporting laws.[53] Death and injury following an induced abortion procedure often occurs at another location without complete knowledge of the previous induced abortion. Follow-up on induced abortion morbidity and mortality is incomplete and haphazard. Provider bias, including concerns about potential malpractice or public image, may significantly impact what is reported.

Respondents and their *amici* raise claims of increased mortality and morbidity from any restriction of immediate access to abortions for adolescents. Past claims of increased morbidity and mortality, including claims by allegedly impartial government agencies, have proven groundless. With regard to the Hyde Amendment, which restricted governmental funding for abortions, Dr. Willard Cates, representing the Centers for Disease Control Abortion Surveillance Branch, predicted a total of 77 excess deaths to women who would seek illegal abortions and an additional 5 excess deaths due to delays in seeking abortion.[54] The same department would later admit that no such increase in mortality or morbidity had occurred.[55] Even Dr. Cates would later admit, "The 'bloodbath' many predicted simply is not happening..."[56] The Court should not be swayed by

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Perspectives, Vol. 30, Number 5, Sept./Oct. 1998.

[53] *See Thornburgh v. Amer. College of Obstet. & Gyn.*, 476 U.S. 747 (1986).

[54] Pettiti and Cates, *Restricting Medicaid Funds: Projection of Excess Mortality*, 67 AMER. J. PUB. HEALTH 860-62 (Sept. 1977).

[55] Centers for Disease Control, *Morbidity and Mortality Weekly Report*, Vol. 28, No. 4, Feb 2, 1979.

[56] Cates, Willard, M.D., Centers for Disease Control, Interview in *The Washington Post*, February 16, 1978.

false claims of abortion safety compared to pregnancy or statistical claims of excess mortality or morbidity.

CONCLUSION

Parental involvement in a teenager's decision to continue or terminate her pregnancy is not only desirable, but beneficial to the overall mental and physical health of the teenage mother.

> In this case, however, we are concerned only with minors who according to the record range in age from children of twelve years to 17-year-old teenagers. Even the latter are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical.

Bellotti v. Baird, 443 U.S. 622, 641 (1979). Moreover,

> The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

H.L. v. Matheson, 450 U.S. 398, 411 (1981); *accord Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 518-19 (1990).

The teenager may have significant medical needs following the abortion procedure that further validate the desirability and benefits of early parental involvement. (Risks of infection, mental and physical trauma, hemorrhage, perforation, undetected ectopic pregnancy, etc.) Further, parental involvement can ensure the continued involvement and responsible management of qualified health professionals who might otherwise be unaware of or unavailable for the continuing medical needs of the teenager.

New Hampshire's plan for parental certification is a safe and effective means of assuring that the mother receives treatment in a timely manner without risking exposure to dangerous procedures and unscrupulous providers. Should the parents be notified and fail to act in the best interest of their teenage child, the physician has ample recourse either through emergency bypass or through termination of parental rights in a child welfare proceeding.

For the reasons set forth hereinabove, the Court's *Amici* respectfully submits that the decision of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

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August 8, 2005

COMPARISON CHART: PREGNANCY COMPLICATIONS AND TREATMENTS

Condition Requiring Treatment	Standard Medical Treatment	Respondent's Treatment Plan
Teenage Pregnancy	Proper Prenatal Care[1] Social and Support Services Treatment of Existing Health Conditions[2] Parental notification, Consultation and Support	Immediate Abortion[3]
Eisenmenger's Syndrome	Oxygen[4] Bed Rest Close Hospital Monitoring Optimize Cardiovascular Function Post-Partum Observation	Immediate Abortion[5]
General Cardiac Conditions	Surgery Not Contraindicated[6] Optimize Cardiovascular Function	Immediate Abortion[7]
Pulmonary Hypertension	See Eisenmenger's Syndrome, *supra*, Medication to decrease Pulmonary Vascular Resistance.[8]	Immediate Abortion[9]

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[1] Israel and Woutersz, *Teenage Obstetrics*, 85 AM. J. OBSTET. GYNECOL. 869 (1963); Anderson, *Comprehensive Management of the Pregnant Teen-ager*, 7 CONTEMPORARY OB/GYN 75 (1976); Briggs, Herren, *et. al.*, *Pregnancy in the Young Adolescent*, 84 AM. J. OBSTET. GYNECOL. 436 (1962); Dwyer, *Managing the Teenage Pregnancy*, 12 OB-GYN OBSERVER 2 (1975); Webb, Briggs, Brown, *A Comprehensive Adolescent Maternity Program in a Community Hospital*, 84 AM. J. OBSTET. GYNECOL. 442 (1962);Houde and Conway, *Teen-age Mothers: a Clinical Profile*, 7 CONTEMPORARY OB/GYN 71 (1976); Sarrel and Klerman, *The Young Unwed Mother*, 105 AM. J. OBSTET. GYNECOL. 575 (1969); Dott and Fort, *Medical and Social Factors Affecting Early Teenage Pregnancy*, 125 AM. J. OBSTET. GYN-ECOL. 532 (1976); Clark, Wong, *et al.*, *The Pregnant Adolescent*, 142 ANN. N.Y. ACAD. SCI. 813 (1970); Zaeckler, Adelman, *et al.*, *The Young Adolescent as an Obstetrical Risk*, 103 AM. J. OBSTET. GYNECOL. 305 (1969).

[2] The only time an adolescent may present for ongoing medical care will be during the period of her pregnancy.

[3] *See generally* Complaint; Brief *Amicus Curiae* of Society for Adolescent Medicine, *etc.*, in Support of Appellees.

[4] Burrow, *et al.*, MEDICAL COMPLICATIONS DURING PREGNANCY 110-111 (6th ed. 2004).

[5] Brief *Amicus Curiae* of Society for Adolescent Medicine at 11.

[6] E. Foster and Paul E. Epstein, Eds., MEDICAL KNOWLEDGE SELF-ASSESSMENT PROGRAM - Part A, Book 2 96-97 (13th Ed. 2003).

[7] Brief *Amicus Curiae* of Society for Adolescent Medicine at 11.

[8] Epoprostenol, Inhaled Nitric Oxide, for example.

[9] Brief *Amicus Curiae* of Society for Adolescent Medicine at 11.

Preeclampsia/Eclampsia	Bed Rest[10] Blood Pressure Monitoring & Control Regulation of fluid intake and output Close Hospital Monitoring Medication for Neurologic Complications Early Delivery if needed[11]	Immediate Abortion[12]
Abruptio Placenta	Prompt Delivery[13] Fluid Resuscitation Blood Transfusion Hospital Monitoring Bed Rest Ultrasound and Lab (HCG) Evaluation	Immediate Abortion[14]
Placenta Previa	Fluid Resuscitation[15] Blood Transfusion Hospital Monitoring Bed Rest Ultrasound and Lab (HCG) Evaluation Cesarean and Early Delivery If needed	Immediate Abortion[16]
Premature Rupture of Membranes Chorioamnionitis	Monitor for signs of infection[17] Intravenous Antibiotic Therapy Fluid Support Delivery if needed	Immediate Abortion[18]
Marfan's Syndrome	Blood Pressure Analysis[19] Frequent Echocardiographic Evaluation B-Blocker Therapy Surgery if needed[20]	Immediate Abortion[21]

[10] MEDICAL COMPLICATIONS DURING PREGNANCY at 54-56; Dildy, *et al.*, CRITICAL CARE OBSTETRICS 438 (4th ed. 2003).

[11] "When severe pre-eclampsia is diagnosed, immediate delivery, regardless of gestational age, has generally been recommended." National High Blood Pressure Education Program Working Group (1990), quoted in CRITICAL CARE OBSTETRICS at 438.

[12] Complaint at 8.

[13] CRITICAL CARE OBSTETRICS at 298.

[14] Brief *Amicus Curiae* of Society for Adolescent Medicine at 12; Complaint at 8.

[15] CRITICAL CARE OBSTETRICS at 298.

[16] Brief *Amicus Curiae* of Society for Adolescent Medicine at 13; Complaint at 8.

[17] MEDICAL COMPLICATIONS DURING PREGNANCY at 314-315.

[18] Brief *Amicus Curiae* of Society for Adolescent Medicine at 12; Complaint at 8.

[19] "Pregnancy should be discouraged in these individuals. Maternal activity should be limited, and prophylactic β-adrenergic blocking therapy should be applied during pregnancy. Ideal monitoring includes blood pressure analysis and serial echocardiographic studies. If there is progressive aortic root dilation or if the aortic root diameter exceeds 5.5 cm, necessary surgical repair can be carried out during pregnancy with good outcomes." MEDICAL COMPLICATIONS DURING PREGNANCY at 112, citing U. Elkayam, *et al.*, *Cardiovascular Problems in Pregnant Women with the Marfan Syndrome*, 123 ANN. INTERN. MED. 117 (1995).

[20] Cesarean section is advised in certain circumstances. MEDICAL COMPLICATIONS DURING PREGNANCY at 112.

[21] Brief *Amicus Curiae* of Society for Adolescent Medicine at 11.

NH Female Leading Causes of Deaths From 1999 To 2002

Leading Cause of Death Description	0 to 4	05 to 14	15 to 24	25 to 34	35 to 44	45 to 54	55 to 64	65 to 74	75 to 84	85 plus	Leading Cause Total
Unknown	22	5	5	11	48	78	104	259	489	801	1,822
Accidents	7	12	44	15	46	28	27	29	75	86	369
Acute bronchitis and bronchiolitis	0	0	0	0	0	0	0	0	2	5	7
Alzheimer's disease	0	0	0	0	0	1	4	25	165	409	604
Anemias	0	1	0	0	0	1	0	1	2	17	22
Aortic aneurysm and dissection	0	0		0	2	2	2	12	47	42	108
Assault (homicide)	3	0	2	4	4	3	2	2	1	2	23
Atherosclerosis	0	0	0	0	0	2	2	12	35	76	127
Cerebrovascular Diseases	0	0	1	2	7	25	32	110	412	671	1,260
Certain conditions originating in the perinatal period	60	0	0	0	0	0	0	0	1	0	61
Cholelithiasis and other disorders of gallbladder	0	0	0	0	0	1	0	0	6	16	23
Chronic liver disease and cirrhosis	0	0		1	5	13	28	29	30	9	115
Chronic lower respiratory diseases	0	0	2	0	3	27	74	211	340	263	920
Complications of medical and surgical care	0	0	1	0	3	1	2	3	5	5	20
Congenital malformations, deformations and chromosomal abnormalities	20	0	1	5	3	3	3	0	7	4	46
Diabetes mellitus	0	1	0	2	7	16	33	89	171	139	458
Diseases of appendix	0	0	0	0	0	1	0	0	1	0	2
Diseases of heart	1	0	3	7	28	102	183	474	1,259	2,282	4,339
Essential (primary) hypertension and hypertensive renal disease	0	0	1	0	1	5	1	11	29	61	109
Hernia	1	0	0	0	0	1	1	0	3	7	13
Human immunodeficiency virus disease - HIV	0	0	0	1	7	0	0	0	0	0	8
In situ neoplasms, benign neoplasms and neoplasms of uncertain or unknown behavior	2	1	2	2	0	3	2	12	33	46	103
Infections of kidney	1	0	0	0	0	0	0	0	0	0	1
Inflammatory diseases of female pelvic organs	0	0	0	0	0	0	0	1	0	0	1
Influenza and pneumonia	2	0	1	1	2	2	7	30	84	208	337
Intentional self-harm (suicide)	0	2	7	17	24	23	8	5	7	1	94
Malignant neoplasms	4	5	9	16	119	332	514	851	1,035	626	3,511
Meningitis	0	0	0	0	0	0	0	1	1	1	3
Nephritis, nephrotic syndrome and nephrosis	1	0	0	1	4	3	10	35	57	78	189
Nutritional deficiencies	0	0	0	0	1		1	3	10	14	29
Parkinson's disease	0	0	0	0	0	0	0	12	38	35	85
Peptic ulcer	0	0	0	0	0	0	4	1	10	22	37
Pneumoconioses and chemical effects	0	0	0	0	0	0	0	0	1	0	1
Pneumonitis due to solids and liquids	0	0	0	0	0	1	2	3	16	33	55
Pregnancy, childbirth and the puerperium *	0	0	1	5	1	0	0	0	0	0	7
Septicemia	0	0	0	2	2	5	13	22	38	27	109
Tuberculosis	0	0	0	0	0	0	0	0	2	0	2
Viral hepatitis	0	0	0	0	1	1	3	1	0	0	6
NH Age Group Death Totals	124	27	81	92	318	680	1,062	2,244	4,412	5,986	15,026

* Included ICD10 codes (O00 through O99).

Rates based on fewer than 10 events are not computed because they do not meet standards of reliability.

NH Pregnancy-Related Cause of Death Compared to Total Deaths By Age Group 1999 To 2002

Age Group	NH Cause of Death Total	Pregnancy-Related Deaths **	Pregnancy-Related Death % of Total
15 to 24	81	1	1.2
25 to 34	92	5	5.4
35 to 44	318	1	0.3

** No deaths were under 22 years of age.

BEST AVAILABLE COPY

Centers for Disease Control
and Prevention (CDC)
Atlanta GA 30333

JUL 20

Mr. Walter M. Weber
Senior Litigation Counsel
American Center for Law & Justice
201 Maryland Avenue, N.E.
Washington, D.C. 20002

Dear Mr. Weber:

We appreciate your interest in the Centers for Disease Control and Prevention's (CDC) efforts to collect and publish maternal mortality statistics (including those related to abortion). CDC makes every effort to identify all such deaths and to present maternal mortality statistics using established scientific methods.

The maternal mortality rate is computed as all maternal deaths per 100,000 live births. In contrast, the measure used for abortions is a case-fatality rate which is computed per 100,000 legal abortions. These measures are conceptually different and are used by CDC for different public health purposes.

CDC calculates the maternal mortality rate per 100,000 live births for the following reasons:

1. To maintain comparability in long term trends for the United States. Estimates of the number of pregnancies (including live births, miscarriages or stillbirths, and induced abortions) in the United States have been published only since the 1970s.
2. The live birth component of the pregnancy estimates is highly reliable. Virtually all births are counted in every year. Estimates of all abortions are based on CDC's abortion surveillance system, which relies on state abortion reporting systems. Estimates of stillbirths, ectopic pregnancies, and miscarriages are based on survey data and are subject to significant sampling error, particularly for smaller population subgroups. Estimates of stillbirths and miscarriages are based on pregnancy history data from the National Survey of Family Growth (NSFG). The NSFG is conducted periodically, every 5 to 7 years. The data are subject to sampling error, particularly for smaller population subgroups. For information on the estimation methodology, see www.cdc.gov/nchs/data/series/sr_21/sr21_056.pdf.
3. To maintain international comparability. Many other countries cannot adequately estimate the number of pregnancies, especially those in which abortion is illegal. Information on miscarriage and stillbirth also varies considerably in completeness. In the interest of international comparability, the World Health Organization has specified that the number of live births should be used for the denominator of the maternal mortality rate.

Adjusting the maternal mortality rate for gestational stage is not statistically feasible, because this requires data that are not currently completely available. The Pregnancy Mortality Surveillance System (PMSS) relies primarily on death certificates which do not typically provide this information. Gestational age may be available for some maternal deaths in cases where linkage with other records (e.g., birth certificates, fetal death reports) is possible. Information on gestational age for induced abortions is available in about 42 states or jurisdictions.

CDC recognizes that despite efforts to count all maternal deaths (including those abortion-related) in the United States, some remain uncounted. The death itself is reported but accurate information on the cause may not be provided. CDC estimates that maternal deaths in general are underreported by 30 to 150 percent (see www.cdc.gov/mmwr/preview/mmwrhtml/ss5202a1.htm). The nature of the surveillance systems make it difficult to obtain complete data. The PMSS compiles data from 50 states, the District of Columbia, and New York City. Abortion surveillance involves data from 47 states, District of Columbia, and New York City. These systems are voluntary (CDC does not provide remuneration for data) and rely primarily on death certificate data which may or may not provide information that indicates the death was maternal or abortion-related. In the case of deaths associated with induced abortion, CDC also uses searches of computerized print media databases (Lexis-Nexis) to identify additional cases.

At CDC we are very committed to improving data collection systems and providing the most accurate and reliable data on all aspects of maternal and infant health. I hope this information is helpful.

Sincerely,

Julie Louise Gerberding, M.D., M.P.H.
Director

Supreme Court, U.S.
FILED
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(12)

No. 04-1144

IN THE

Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF THE PETITIONER

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Eller, *Informed Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 Notre Dame L. Rev. 639 (1996) 16

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is a nonprofit public interest law firm and education organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have briefed and argued, or presented the views of amici curiae, in numerous cases before this Court on these issues.

This brief is being filed with the consent of the parties.

SUMMARY OF ARGUMENT

The First Circuit struck down New Hampshire's parental notification law for lack of a "health" exception. The court below viewed this Court's precedents as imposing a *per se* blanket requirement that any and all abortion laws contain an exemption for maternal "health."

In so ruling, the court below went badly astray.

First, the Constitution imposes no such across-the-board "health" exception to otherwise valid abortion laws. This Court has never imposed such a requirement outside of the context of laws *banning* abortion or particular methods of abortion. More particularly, this Court has repeatedly sustained parental involvement requirements for abortion by minors without any suggestion that, in addition to any judicial bypass option, a broad "health" exception must also be available. To impose a new across-the-board "health" exception would render abortion laws largely meaningless because of the breadth and subjectivity of that exception. Moreover, this new requirement would expose to renewed challenge a host of abortion regulations previously adjudged constitutional. Even more importantly, a broad

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[1]No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

exception for "health" abortions would actually *jeopardize the health of minors* because of the harms associated with abortion, and in particular with secret abortions by minors, as explained in the following argument point.

The second principal fault with the First Circuit's rationale was its total disregard for the competing harms posed by the *allowance* of secret abortions by minors. The Constitution permits a state to weigh these countervailing threats and to strike a reasonable balance. A state may therefore properly decline further to loosen its parental involvement laws by adding a broad "health" exception. The greater incidence of secret abortions by minors that could be expected to result from such an exception would, aside from the obvious harms to a minor's unborn child and to the rights of the minor's parents, expose minors themselves to a greater risk of:

- coerced abortions
- incomplete, deceptive, or biased abortion counseling
- substantial emotional harm from abortion
- significant physical harm from abortion
- state endorsement of a minor's deceit of her parents
- cover for sexual predators.

These valid, indeed compelling concerns find ample support in the previous decisions of this Court and in the relevant published literature. In addition, the actual experiences of women who had secret abortions as minors, whose sworn testimony was among the hundreds of post-abortion affidavits recently submitted to a Senate subcommittee, vividly illustrates both the reality and the seriousness of these concerns.

In balancing the competing interests, New Hampshire reasonably and legitimately declined to adopt a broad "health" exception that would further expose minors to the grave risks associated with secret abortions.

ARGUMENT

The First Circuit held that New Hampshire's Parental Notification Prior to the Abortion Act (the "Act") is *per se* facially unconstitutional because it does not contain an exception for "health." *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 62 (1st Cir. 2004). This holding is erroneous and should be reversed.

In addition to other flaws,[2] the decision below failed to

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[2]Perhaps most glaring is the First Circuit's conclusion that the well-settled standard for facial challenges, set forth in a long line of cases including *United States v. Salerno*, 481 U.S. 739, 745 (1987), *Reno v. Flores*, 507 U.S. 292, 301 (1993), and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) (per Kennedy, J., joined by Rehnquist, C.J., & White, Stevens, O'Connor, & Scalia, JJ.), no longer applies to abortion regulations. *See* 390 F.3d at 57-58. But contrary to the First Circuit's conclusion, this Court's decisions in neither *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), nor *Stenberg v. Carhart*, 530 U.S. 914 (2000), purported to alter the standard for facial challenges or to overrule prior decisions applying that standard. *See, e.g., Connecticut v. Menillo*, 423 U.S. 9, 9-10 (1975) (per curiam) (total ban on abortions was *not* "null and void, and thus incapable of constitutional application"; to the contrary, ban could still be *valid as applied*).

The First Circuit based its conclusion on the *Casey* Court's embrace of the "undue burden" test for judging the constitutionality of abortion statutes, and *Stenberg*'s reaffirmation of that test. 390 F.3d at 57. But this mixes apples and oranges. The "undue burden" test in the abortion context no more precludes invocation of the *Salerno* standard than does the "reasonable foundation" test in the context of INS regulations. *See Reno*, 507 U.S. at 301, 309 (invoking *Salerno* standard and then applying substantive "reasonable foundation" test to evaluate constitutionality of particular rule). The "facial vs. as applied" nature of a challenge determines the *scope* of the challenge (viz., to the entire statute vs. to a particular application) and thus the possible resultant *relief* (viz., total invalidity vs. partial invalidity). The particular constitutional test on the *merits* (e.g., "undue burden," "excessive

(continued...)

consider two crucial points.

First, this Court has never imposed an across-the-board "health" exception for *all* abortion regulations, and in fact has rejected such a claim both expressly and by implication. To impose such a novel exception would throw this Court's abortion jurisprudence into disarray and would prompt widespread challenges to laws already upheld in court.

Second, the First Circuit failed to appreciate the harms that flow from *allowing* minors to undergo secret abortions. The state of New Hampshire, facing alleged harms on both sides of the equation -- from the denial *and* from the allowance of secret abortions by teenage children -- struck a balance designed to minimize both potential harms. The Constitution does not require states -- or courts -- to overlook the very real harms suffered by women who undergo secret abortions as minors.

I. AN ACROSS-THE-BOARD "HEALTH" EXCEPTION WOULD BE UNPRECEDENTED AND UNWARRANTED AND WOULD JEOPARDIZE MANY ABORTION REGULATIONS ALREADY UPHELD.

In *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), this Court held that laws banning abortion must contain exceptions for those abortions necessary to preserve the life or "health"[3] of the

[2](...continued)
entanglement," "cruel and unusual") determines whether that challenge will succeed. The two concepts are distinct, and the First Circuit erred by confusing them.

[3]In *Doe v. Bolton*, 410 U.S. 179, 192 (1973), this Court defined "health" so broadly as to render the term virtually unrecognizable: "all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant
(continued...)

mother. In *Stenberg*, this Court extended the "health exception" requirement to laws banning particular *methods* of abortion. But this Court has *never* held that *all* laws regulating the provision of abortions must contain a "health" exception. Indeed, this Court has explicitly and implicitly rejected such a contention. To embrace such a *per se* requirement now would be to make a shambles of existing abortion regulations.

A. This Court Has Never Required a Blanket "Health" Exception for All Abortion Regulations.

This Court *explicitly* rejected a "health" exception in the context of abortion funding. In *Harris v. McRae*, 448 U.S. 297 (1980), this Court ruled that governments could bar the use of taxpayer funds *even for abortions necessary to preserve maternal health*. *Id.* at 316-17.

This Court *implicitly* rejected a health exception in the context of a 24-hour waiting period, in which this Court held sufficient an emergency exception that covered, not all "health" concerns, but only genuinely serious threats of "substantial and irreversible consequences" to maternal physical health. *See Casey*, 505 U.S. at 800 (joint opinion), 902 (quoting statute).

Most pertinent here, this Court has implicitly, and repeatedly, rejected a "health" exception in precisely the context of parental involvement laws. In case after case, this Court found sufficient the addition -- as here -- of a judicial bypass option. *See Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *Planned Parenthood*

[3](...continued)
to the well-being of the patient." In no other context has this Court declared an essentially illimitable constitutional right to an exemption from laws in order to preserve one's life, much less one's physical health or mere "well-being." Indeed, if such were the constitutional rule, there would have to be "health" exceptions for military draft evasion laws, proscriptions against unapproved experimental drugs and narcotics, vaccine requirements, school attendance laws, and a vast array of other legal obligations.

Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Center for Reproductive Choice*, 497 U.S. 502 (1990); *Casey*, 505 U.S. at 899-900 (joint opinion); *Lambert v. Wicklund*, 520 U.S. 292 (1997) (per curiam).

The First Circuit dismissed this line of cases as not having *expressly* considered whether a "health" exception was necessary. 390 F.3d at 60. But the *Roe* test -- including "health" exceptions for abortion bans -- was hardly a secret this Court might have somehow overlooked. And in *Casey*, this Court both reaffirmed *Roe*'s requirement of a "health" exception *and* sustained a parental involvement law that contained no such exception. *See* 505 U.S. at 899-900 (upholding requirement), 904-06 (quoting statute).

B. A Blanket Requirement for a "Health" Exception Would Jeopardize Many Valid Abortion Regulations and Actually Endanger Women's Health.

The alleged *benefit* of a broad "health" exception is deceptively obvious -- the seeming avoidance of certain potential risks, no matter how small. The *cost* of a broad "health" exception, by contrast, may be less obvious and thus deserving of some elaboration.

1. Evisceration of abortion laws

One cost of a broad "health" exception should be plain: if "health" means virtually everything, then laws with "health" exceptions mean virtually nothing. Subjecting any and all abortion laws to the practically unreviewable judgment of the abortionist that it might be marginally more "healthy" to disregard a given legal requirement would be effectively to sacrifice the important, even compelling, state interests

underlying such laws. *See Stenberg*, 530 U.S. at 972 (Kennedy, J., dissenting) ("A ban which depends upon the 'appropriate medical judgment' of [the abortionist] is no ban at all. . . . This, of course, is the vice of a health exception resting in the physician's discretion"). And in a competitive "race to the bottom," those abortionists with the most lax and malleable understanding of "health" would tend to become the most sought-after providers.

2. Unleashing of new wave of challenges to abortion laws

Another important cost of a broad *per se* "health" exception is less obvious but no less inevitable: the launch of an extensive new wave of challenges to countless abortion regulations already upheld. Any law touching upon abortion but lacking an express exception for "health" would become vulnerable to immediate constitutional attack. This has already begun to happen with parental involvement laws, and not just in the present case. *See Planned Parenthood of the Rocky Mtns. Servs. v. Owens*, 287 F.3d 910 (10th Cir. 2002); *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1964 (2005). The same will surely happen to a range of other laws. For example, if all abortion laws must contain a "health" exception, then how could a court sustain a law imposing a blanket ban on abortions by nonphysicians? *But see Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam). A law requiring *all* abortions after the first trimester to be done in hospitals? *But see Simopoulos v. Virginia*, 462 U.S. 506 (1983). A law barring the use of state employees, facilities, or funds for abortions? *But see Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

3. Exposure of women to harms associated with abortions

A third, but by no means less important, cost from the imposition of a broad "health" exception is the harm *on the other side of the equation*, i.e., the harm that can result from proceeding with an alleged "health" abortion despite the otherwise governing law.

As discussed in greater detail below, such costs are all too real for minors who undergo secret abortions. *See infra* § II. But the harms are not limited to minors. More and more women who have had abortions have been summoning the courage to speak out about the grave emotional and physical toll their abortions took on them. *See, e.g.*, www.silentnomoreawareness.org (Silent No More Awareness Campaign), www.afterabortion.org (Elliot Institute), www.operationoutcry.org (Justice Foundation; links to testimonies of women hurt by abortion), www.lovematters.com/women.htm (testimonies). More and more published, peer-reviewed studies are indicating that abortion, far from being a health panacea, may in fact be a health disaster for women (not to mention, of course, their unborn children). *See* T. Strahan, *Detrimental Effects of Abortion: An Annotated Bibliography with Commentary* (2001). How much of this harm, grief, and personal tragedy might have been averted had abortion not been all too readily available (i.e., because tax-funded, or offered without any period of reflection or truly informed consent, or free from the accountability and market effects of quality controls required of other medical facilities)?

In sum, there are powerful reasons why this Court should not impose a new, universal requirement of a "health" exception for any and all abortion regulations (and in particular, for parental involvement laws). If anything, this Court should take a long, hard second look at the untoward consequences of the *Roe/Casey* "health" exception, as expanded in *Doe* and *Stenberg*.

II. THE HARMS RESULTING FROM SUBJECTING MINORS TO SECRET ABORTIONS JUSTIFY A STATE NOT ADOPTING AN OPEN-ENDED "HEALTH" EXCEPTION.

As discussed above, there are two sides to the balance a state faces when regulating in the context of abortion. Respondents Planned Parenthood *et al.* focus exclusively on one side -- the harms that arguably might result to certain minors should particular medical scenarios arise. But a state may take a more balanced approach and consider the actual and potential harms on all sides. Any additional loosening of parental involvement laws will likely result in more secret underage abortions. A state is entitled to weigh the harms associated with such abortions and to balance those harms against the hypothetical cases respondents proffer. As this Court has observed, parental involvement laws reflect "the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart." *Casey*, 505 U.S. at 895.

The secret abortion of a minor's pregnancy results, like all abortions, in the destruction of an unborn child, a matter the state is entitled to consider. Also compromised *pro tanto* are the rights of parents to direct the upbringing of their children and to supervise and manage their children's health care.

Less commonly known are the specific harms a secret abortion can visit upon the minor herself. These countervailing "health" harms, very significant and probably far more real than respondents' strained hypotheticals, amply justify a state's decision not to weaken its parental involvement statute with a porous "health" exception.

The harms set forth below are illustrated with accounts taken from the sworn testimony of actual women who had secret

abortions as minors. These women were among the hundreds upon hundreds whose statements were recently submitted to a Senate subcommittee. *See* "Affidavits of Post-Abortive Women Filed in the Roe v. Wade and Doe v. Bolton Cases" (3 Vols.) (hereafter "Aff."), submitted for record of hearing in "The Consequences of Roe v. Wade and Doe v. Bolton," Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary (hearing held on June 23, 2005).[4] There is no reason to believe that the experiences of these women are unique.

A. Coerced abortions

It is "*the woman* who must live with the implications of her decision" to abort. *Casey*, 505 U.S. at 852 (emphasis added). Yet the woman may face pressure to abort -- from boyfriends, from employers, from family members. *See, e.g.*, Rue, Coleman, Rue & Reardon, *Induced abortion and traumatic stress: A preliminary comparison of American and Russian Women*, Med. Sci. Monitor, Vol. 10, No. 10 (2004) (Table 4) (available at www.MedSciMonit.com/pub/vol_10/no_10/4923.pdf) (study found 64% of American women felt pressured by others to have abortion). A minor, because of her relative immaturity, may find it significantly more difficult to resist such pressure, and thus her abortion may not be her choice, but rather the choice of someone else.

The testimony of actual women illustrates the reality of this problem.[5]

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[4]For the convenience of the Court, the affidavits of five of these women are included in their entireties as an appendix ("Appx.") to this brief.

[5]Remarkably, of the women whose statements submitted to the Senate subcommittee indicated they had undergone secret abortions as minors, *more than half* indicated they were pressured to do so, primarily by (continued...)

Lisa B. relates:

> First abortion at 14 years old . . . . My boyfriend, 6 years my senior, served as the impetus . . . .

Aff. p. 131.

Another woman, Jennifer G., recalls:

> The [high school] counselor and I were close friends. I confided in her that I was pregnant, and she advised me the best thing to do would be to have an abortion. She told me if I continued with my pregnancy I would probably be kicked out of the dance team and my life would be complicated with a child. We talked about this almost every day and she finally made an appointment for me with an abortion clinic. I did not go to the appointment. She then continued to talk to me about how hard it would be and scheduled another appointment for me. I went to the appointment and had the abortion done. I realize now that the school counselor pressured me into having the abortion because I was happy with the news that I was pregnant. My boyfriend was happy, too. Of course, at the age of fifteen and not having confided in anyone else for advi[c]e except her, I definitely feel that she coerced me into having the abortion. I was too vulnerable at that time.

Aff. p. 500.

Tiffany P., aged 17, faced a boyfriend who had been armed with arguments by his parents:

> When I first realized that I was pregnant, I was very afraid. I first confided this information with my boyfriend. . . . [H]e ran home and told his parents. Not wanting themselves or their child to be responsible for my child or me, they

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[5](...continued)
boyfriends but also by others, including third-party adults.

> counseled him on how to persuade me to have an abortion. He did so very convincingly. I was asked to think about all that was before me in my life, graduation, college, career and all that I had to lose by having a child. And of course, there were my parents to think about. How would they deal with a single pregnant daughter? I would be letting them down dashing all of the dreams and aspirations that they held for my life. What about him, what did I expect from him and out of him? Did I really believe we were ready to be parents? Did I really want to give up all the experiences and fun that lied ahead? I guessed not.

Aff. p. 771 (Appx. 20a-21a).

Joan A. found herself surrounded on all sides by pressure to abort, including a hard sell at the abortion facility:

> I became pregnant out of wedlock at the age of 17 by my then current boyfriend. . . . He and his family then began to "talk me into" having an abortion. I have always been against abortion and at first refused to do so. I did not talk over the subject with my mother because I was frightened to tell her that I was pregnant and of her reaction. Then a good friend of my boyfriend's began to talk to me. She told me about her history of being pregnant and not married and how it had ruined her life to be a single parent and, after much persuasion, I reluctantly agreed to have the abortion. Planned Parenthood also made their fervent case to me about abortion being the only answer.

Aff. p. 1219. *See also id.* pp. 340 (pressured by high school classmate), 375 ("I was sixteen years old . . . I was afraid and confused. A friend influenced me to have an abortion"), 385 (at age 17, pressured by boyfriend and friends), 418 (at age 15, pressured by abusive boyfriend; at age 16, pressured by probation officer), 484 (at age 15, pressured by boyfriend and

sister), 551 (at age 17, pressured by boyfriend and friends), 634 (at age 16, pressured by boyfriend and his mother), 901 (at age 17, pressured by her 40-year-old boss, with whom she was having an affair), 960 (at age 17, "my boyfriend at the time gave me no other options"), 1064 (at age 14 or 15, pressured by boyfriend and his sister), 1089 (at age 16, pressured by boyfriend), 1214 (at age 17, boyfriend "manipulated me and told me if I had the abortion that we would get married"), 1272 (at age 16, pressured by boyfriend, his older brother, and the girlfriend of his older brother).

Parents can be instrumental in enabling their daughter to resist third-party pressures to abort. Tiffany P., for example, after having two abortions and getting pregnant yet a third time, finally confided her situation to her parents. When her boyfriend's parents tried to coerce her, by threats, into aborting once more, Tiffany's parents fended them off. Aff. 773-74 (Appx. 25a-28a). Tiffany was no longer a minor, yet she found relief in her parents' support. A teenager's need for parental help to resist coercion is much more probable.

B. Minor's Greater Vulnerability to Incomplete, Deceptive, or Biased Abortion Counseling

The involvement of a parent, whose critical reasoning skills, knowledge, and life experience (including particularly experience with bearing and raising children) will in almost every respect exceed those of the minor, can provide an essential check against incomplete, deceptive, or biased counseling the young teenager may otherwise face alone. *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality) (noting minor's "peculiar vulnerability" and "inability to make critical decision in an informed, mature manner"); *id.* at 635 ("minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them") (footnote omitted).

Lorraine B.'s experience illustrates how inadequate and one-sided counseling can be.

> I went to the clinic located next to my school. They confirmed I was three months pregnant. They asked *when* I wanted my abortion and stated that I should have it right away. They said "no one has to know about this, just fill out this paperwork and everything will be taken care of at no cost." That's all they told me. They did not offer counseling. They did not tell me about potential complications, physical or mental. They did not discuss adoption or any alternatives with me. I felt I did not even have to make a decision, it was all made for me. . . .
>
> . . . When I went in for the abortion, the doctor talked down to me and said horrible things to me about me as a person. He did not counsel me not to have the abortion. He did not counsel me about any possible side [e]ffects.

Aff. p. 61 (Appx. 2a-3a) (emphasis in original). *See also* Aff. pp. 46 (at a Planned Parenthood facility, "No other choices [besides abortion] were offered to us"), 418 ("they only spoke about the 'positives' of having an abortion"), 466 ("I was shown a tray full of all sorts of contraceptive options . . . . That is the only c[ouns]eling I received").

"The decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 (1976). Yet inadequate counseling may well be the norm. *See Bellotti*, 443 U.S. at 641 ("It seems unlikely that [the minor] will obtain adequate counsel and support at an abortion clinic") (plurality) (internal quotation marks and citation omitted). Indeed, of the women whose statements submitted to the Senate subcommittee

indicate that they had secret abortions as minors, almost all denied that their counseling adequately addressed the nature and consequences of abortion. Aff. pp. 46, 61, 131, 188, 340, 385, 418, 419, 466, 484, 551, 634, 672, 901, 967, 992-93, 1064, 1089, 1137, 1214, 1272.

In at least some cases, pregnant minors are given false information. *See* Aff. pp. 340 ("I was told that it was a piece of tissue with no heart, no limbs or any other human parts, and that there were no health risks"), 771-72 (Appx. 22a) (the counselor at the abortion facility "began to explain to me that although I was approximately 12 weeks pregnant that what was inside of me was nothing more than a small glob of flesh no larger in diameter than a half dollar coin. It was not alive yet, had no heartbeat or extremities. It was just a glob of flesh"), 1137 ("I was lied to. I was told they were only giving me a pap smear"), 1214 ("I did not understand what an abortion was . . . . I was 17 at the time and told it was nothing"), 1272 ("I was told that the baby was not alive yet").

Parental involvement thus furthers "the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey*, 505 U.S. at 882 (joint opinion).

> As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor . . . and particularly desirable with respect to the abortion decision . . . .

Bellotti, 443 U.S. at 640 (plurality).

C. Emotional Harm to Minors and Subsequent Self-Destructive Behavior

Minors who obtain secret abortions face potentially severe mental harm. "The . . . emotional[] and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." *Ohio v. Akron Center*, 497 U.S. at 519 (quoting *H.L. v. Matheson*, 450 U.S. 398, 411 (1981)).

An extensive body of professional literature explores the various "risk factors for emotional maladjustment to abortion." Reardon, *Abortion Decisions and the Duty to Screen: Clinical, Ethical and Legal Implications of Predictive Risk Factors of Post-Abortion Maladjustment*, 20 J. Contemp. Health L. & Pol'y 33, 39 (2003) (listing, in accompanying footnote, thirty-four studies); Eller, *Informed Consent Civil Actions for Post-Abortion Psychological Trauma*, 71 Notre Dame L. Rev. 639, 639-40 & nn. 2-25 (1996) (listing risk factors and supporting authorities). Adolescence or emotional immaturity is one such factor. *Reardon, supra*, at 109 (listing fifteen authorities). *Accord* Eller, *supra*, at 641 & n.23.

The testimony of actual women starkly illustrates this adverse consequence.

Tammy D. describes her experience, starting with the evening of the day she had her first abortion.

> I went home and pretended as if life was normal and I hadn't just terminated a life. That evening though, the cries of a baby, my baby would not let me sleep. The tormented screams that rang through my head over the next couple of weeks were too much to bear and I started drowning them in alcohol and drugs. Anything I could get my hands on in order to quiet the pain that echoed in my heart, my mind and my soul. A reckless endangerment of my own life ensued and I found myself in one promiscuous situation after another. I quit going to school and worked and partied full time instead. I couldn't bear the thought that everyone at my high school must know of what I had done. After numerous sexual encounters some that were not only unwelcome, but also violating, left their marks on my being to a point that my worth had nose-dived below zero. . . . [Pregnant again but in an "incredibly dysfunctional" relationship,] I was so depressed that the only thoughts that kept me from taking my own life were those of the new life growing inside of me. . . . [M]y nagging feelings of little value and no worth were due to the fact that I had taken the precious life of my own child and I didn't know that my not feeling "good enough" to be alive was directly due to my abruptly stopping the life of my first child. . . . I believe that even though I loved this life inside of me, I still hated the shell in which he was growing to the point of still trying to block out the pain from the loss of my first child which I was directly to blame for.

Aff. p. 357 (Appx. 8a-9a).

T.R. also suffered lasting emotional trauma:

> [A]fter the abortion, I felt unworthy, Sad, Broken. For many years I was self destructive. No standards in my life -- drank, drugs, men e[tc.] . . . I never forgot . . . It still affects me 19 years later -- I'm crying right now. And I remember that day so clearly -- the date is stuck in my head forever.

Aff. p. 1089. *See also* Aff. pp. 46 ("I will always feel shame and guilt"), 62 (Appx. 3a) ("guilt and anxiety"), 131 (self-hatred, anger, guilt, shame, drug addiction, self-destructive behavior), 188 ("severe depression for months around the anniversary. Guilt, shame, self hate, marital sexual d[y]sfunction, dreams"), 349 ("I have been drinking Alcohol nearly everyday of my life Since the Abortions. . . . I feel so much Shame and I hate

myself"), 349 ("terrible anger, shame, grief, depression, and an inability to bond with my first living child"), 385 ("post abortion syndrome for 16 years . . . Became addicted to sleeping pills because of sleep deprivation. Experienced horrible nightmares of mutilated babies"), 418 ("I have been depressed to the point of total despair, substance abuse, promiscuous behavior in an attempt to 'replace' my children, self-destructive behavior, nightmares/flashbacks of abortions, uncontrollable anger, severe depression on the anniversaries of the abortions & expected due dates"), 466 ("Tons of guilt and crying," alcohol and drug abuse for eight years, shame and guilt for many years), 484 (self-destructive behavior, alcohol and drug abuse, self-hatred), 500 (depression, twice to the point of hospitalization, plus "very depressed" yearly around anniversary of aborted baby's due date), 551 (many years of guilt, sadness, longing for the aborted child), 673 (Appx. 17a) ("a long road of emotional pain," plus annual depression in month child would have been born), 772 (Appx. 23a-24a) (drug abuse, emotional wallbuilding), 901 ("pain and suffering," feeling "ashamed and dirty & lonely"; "There hasn't been a day since the abortion that I don't think about how I murdered a helpless child. Not just a child, my child"), 960 ("major depression for 4 years"), 993 (Appx. 36a) ("I hated myself, hated what I did & *wanted my baby back*!") (emphasis in original), 1022 ("years of guilt and shame"), 1137 ("I became a door mat after the abortion in all areas of my life"; "A Haunty guilt has been my dark cloud"; "die a little inside each day"), 1214 ("left me devastated," "unimaginable guilt, sorrow and horror [I] live with every day of [my] life," the "one thing in life" that she "will always regret doing"), 1219 ("guilt, regret, and sorrow have filled [m]y soul"), 1272 (drug and alcohol abuse, bulimia, major clinical depression, years of nightmares, guilt, regret).

Two women revealed that they had suffered sexual assault --

rape and incest. Both stated unequivocally that the trauma of abortion, for them, was even worse.

Emily F. explained:

> My 2d aborted child was a product of rape. I no longer struggle with the fact I was raped. I'm not depressed about it, I don't have nightmares. I will never "get over" losing my children to abortion.

Aff. p. 418. Christian O. adds:

> I grieved the loss/murder of my child so much that I would have preferred death. . . . It was psychologically more devastating than being molested and sexually abused by my biological father. The abortion will be with me for the rest of my life.
>
> . . . .
>
> Explain to me why I was legally able to murder my child but if I had killed my father who had molested me at seven years of age and then sexually abused me when I was 12 to about 16 -- almost 17, I would have been sentenced. My baby did nothing wrong; my dad did.

Aff. p. 992 (Appx. 32a-33a).

D. Physical Harm to Minors

Abortion takes a normal, healthy condition -- pregnancy -- and, by chemical or surgical means, disrupts that condition. Unsurprisingly, this disruption entails physical risks and harms to the mother. "The medical . . . consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." *Ohio v. Akron Center*, 497 U.S. 519 (internal quotation marks and citation omitted). A growing body of medical literature documents these risks. *See* T. Strahan,

Detrimental Effects of Abortion: An Annotated Bibliography with Commentary (2001); *see also A List of Major Physical Sequelae Related to Abortion*, at www.abortionfacts.com/reardon/effect_of_abortion.asp (listing published medical sources). Thus, any allowance for "health" abortions brings a concomitantly increased risk of "health" complications.

Again, the testimony of actual women bolsters this concern. *See* Aff. pp. 61-62 (Appx. 3a-4a) (severe cramps, vomiting, hemorrhage, emergency hospital visit for incomplete abortion, sterility), 340 (kidney problems), 418 (physical pain, irregular periods, miscarriages), 419 (miscarriage of only subsequent pregnancy), 500 (physically painful), 772 (Appx. 22a) (during suction abortion, "I remember thinking that I was going to die. I had never felt such pain, nor have I since. I thought my entire insides were being sucked out"), 993 (Appx. 36a) (during suction abortion, "the most immense, intense pain I have ever felt"), 1022 (severe hemorrhaging and infection requiring trip to hospital).

Ironically, if the physical consequences of the abortion are sufficiently severe, the parents will find out about the secret abortion anyway when they are called upon to consent to further treatment of their daughter. *E.g.*, Aff. pp. 61 (Appx. 3a) ("I had to tell them everything on the way to the hospital"), 1022 ("My mother was contacted, told what happened and asked to come sign the consent papers").

Even if the minor goes ahead with the abortion, the involvement of her parents has a health benefit. Minors

> are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical.

Bellotti v. Baird, 443 U.S. at 641 (plurality).

E. State Endorsement of, and Complicity in, a Minor's Deception of Her Parents and Others

Official allowance of secret abortions by minors teaches such minors that it is permissible to lie to their parents, even regarding serious matters. The corrosive effect on both the parent-child relationship and the minor's personal character is obvious:

Tiffany P. recounted that, after her secret abortion,

> I went on as if nothing had happened to me. I held everything inside. No one important in my life could know what I had done. It was to be a secret forever, to death. The walls began to build up inside. It was the only way to keep my abortion a secret, to build walls. *This was the first serious lie I had ever told my parents*. We drifted apart inside my heart but the facade never changed. They never suspected a thing. I would never let them. The more emotion I felt inside the more walls that went up to deal with them. Soon I wasn't feeling much of anything; the walls were now not just emotional. I began to party quite a bit. I did some drugs, and tried many others. I drank every weekend and the lies about my lifestyle began to build walls upon walls upon walls, until I couldn't see over them anymore. I had lost myself.

Aff. p. 772 (Appx. 23a-24a) (emphasis added).

Perhaps not surprisingly, once a teenager receives official permission to lie, the teenager may lie to government agents as well -- including judges -- in order to manipulate the bypass system. As Tammy D. relates:

> I went before a judge to request my being able to have an abortion without telling my parents. My advocate at the time coached me as to what to say in order to build compelling

> evidence that the involvement of my parents would cause them to throw me out of the house. That was not true at all, they would not have done that. The judge sided with me though and agreed it was indeed in my best interest to have the abortion and not tell them anything about it.

Aff. p. 357 (Appx. 7a-8a).

F. Cover for Sexual Predators

Pregnancy reveals that the teenager has engaged in sexual intercourse. Abortion may conceal that fact. And if the male party is a sexual predator, abortion becomes a handy means of destroying the evidence and prolonging the predator's window of opportunity. *See, e.g.*, Aff. pp. 61 (Appx. 2a) (16-year-old impregnated by 23-year-old boyfriend), 131 (14-year-old impregnated by 20-year-old boyfriend), 901 (17-year-old impregnated by her 40-year-old boss).

* * *

As illustrated above, there are many very serious downsides to the allowance of secret abortions for minors. A state may justifiably take these downsides into account, and decline to add yet another broad exception -- "health" -- to a parental involvement law that is already too easily circumvented.

CONCLUSION

This Court should reverse the judgment of the First Circuit.

Respectfully submitted,

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August 8, 2005

APPENDIX:

Selected sworn affidavits of women who had
secret abortions as minors (printed form headings
and footers and some formal elements omitted)

Source: "Affidavits of Post-Abortive Women
Filed in the Roe v. Wade and Doe v. Bolton Cases,"
submitted for record of hearing in "The Consequences
of Roe v. Wade and Doe v. Bolton," Senate Judiciary
Committee, Subcommittee on the Constitution, Civil Rights
and Property Rights of the Senate Committee on the Judiciary
(hearing held on June 23, 2005)

[61]

AFFIDAVIT

THE STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

Before me, the undersigned authority, on this day personally appeared Lorraine C. Baker, who, being by me duly sworn, upon oath, stated the following facts:

My name is Lorraine C. Baker. [address redacted] I am over the age of eighteen years, and I am of sound mind and competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit, and I do solem[n]ly swear, or affirm, that the following facts are true:

1. When I was 16 years old, in 1976, I became pregnant by my boyfriend who was 23. I was afraid to tell anyone because I did not want to get him in trouble and because I feared what my parents would do if they found out.

2. I went to the clinic located next to my school. They confirmed I was three months pregnant. They asked when I wanted my abortion and stated that I should have it right away. They said "no one has to know about this, just fill out this paperwork and everything will be taken care of at no cost." That's all they told me. They did not offer counseling. They did not tell me about potential complications, physical or mental. They did not discuss adoption or any alternatives with me. I felt I did not even have to make a decision, it was all made for me. I did what they said, filled out the paperwork and was told when and where to go for the abortion.

3. When I went in for the abortion, the doctor talked down to me and said terrible things to me about me as a person. He did not counsel me not have the abortion. He did not counsel me about any possible side affects. After the abortion, I was left all alone, crying in pain with severe cramps and vomiting in a room for what seemed like several hours, although I honestly don't know how long I was there. A nurse came in and told me to be quiet and then left. I felt terrible, the pain was terrible.

4. A couple of weeks after the abortion, I started having severe cramps and a lot of blood came out of me. My parents rushed me to emergency, (I had to tell them everything on the way of course) where I found that I was miscarrying the dead fetus [62] that had been left inside of me and that I needed an emergency D&C. I have since been told I was probably pregnant with twins and the abortionist only took one of them out, leaving the other to rot for two weeks inside of me.

5. Again, I was left alone in a room cramping and bleeding and crying while I awaited my emergency D&C. This was a terrible experience for me and I would not wish my worst enemy to go through anything like it. Of course, it was also hard on my parents and I have since learned that fetuses can feel the pain. This has left me with much guilt and anxiety for which I have had to have counseling that needless to say was not free.

6. As time passed, I would reflect on how old my child/children would be, I would imagine watching them play and celebrate birthdays and the like.

7. I coped okay, until I married at age 30 and after several

years of trying to conceive I discovered that because of the trauma my body experienced when I was 16, I was sterile. We would only be able to have kids if we adopted them. This sent me into a deep depression. My husband will never know his own children because of a decision I made when I was too young to be making the decision on my own. He had done nothing wrong but now had to bear the consequence of my abortion. If I had known sterility was even a remote possibility, I would have seriously reconsidered my decision to abort the pregnancy.

8. I strongly believe that women, and especially teens, have the right to learn everything they can about what an abortion is, what it does to the fetus, and what emotional problems will arise in the future. They should be allowed and encouraged to learn as much as possible, to see pictures of their developing baby, to get counseling before they make any decision.

9. Adoption is a wonderful option for an unwanted pregnancy. The state makes money, the child gets to live, and the adoptive parents have to go through a pretty rigorous process to prove they are competent to raise the child, and the birth mother gets to choose what kind of contact she wants as the child grows up. If the mother wants to abort the baby, it costs the state money, the child dies and there is not much in the way of quality counseling available to the mother. We need to start recognizing the alternatives to abortion as valid and even preferable. We need to recognize the amount of hurt that is out there for the women who chose abortion. We need to realistically look at how much pain abortion really is causing people, women and men.

[63]

10. I am sharing my story with you because no one shared

theirs with me. It is important for everyone to hear these stories. I am certain there are many thousands more of them just like this one.

11. Women who choose to carry their child to term have many more choices than those who choose abortion. They will have the choice of raising your baby themselves, with a strong support groups to help, or the choice of allowing him or her to be adopted with much, some, little or no future contact, again, their own choice. These are all choices that give the baby a chance to live a good life, while not putting women at risk for the complications of abortion; as in my case of never being able to have a child, which now increases my risk for breast and ovarian cancers. With abortion, there is nothing, only the death of a baby and the possibility that there will never be another one for her.

12. If I had have given my babies up for adoption, even though I would not have raised them myself, I would have watched them graduate from high school and start college. I would have been at the weddings and I would be able to share in the joy of their own children. Instead, there is nothing there, just a pair of twins who died 25 years ago before they had a chance to be born.

I have read the above and foregoing statement and same is true and correct.

SIGNED this 13th day of May, 2001.

Please use my:

☒ full name. /s/ Lorraine C. Baker/Lorraine C. Baker
My signature evidences my authorization

☐ initials only. to use this affidavit for all purposes.

SUBSCRIBED AND SWORN TO before me, the undersigned authority, this 16th day of May, 2001.

/s/ Gurdial Singh Gill
Notary Public

[356]

AFFIDAVIT

THE STATE OF Minnesota §
§
COUNTY OF Anoka §

Before me, the undersigned authority, on this day personally appeared Tammy Dempsey, (Print Name) who, being by me duly sworn, upon oath, stated the following facts:

My name is Tammy Dempsey (Print Name). My address is [redacted]. [I am] over the age of eighteen years, and I am of sound mind and competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit, and I do solemnly swear, or affirm, that the following facts are true: See Attached

[357]

My name is Tammy Dempsey and I am 31 years old. My story begins over half of my life ago and has yet to find a completed end. In October of 1986, I was sixteen years old and pregnant. Being in an obviously undesirable situation, I was afraid and confused. A friend influenced me to have an abortion, deeming it to be the only way out of a horrible predicament. Being underage and not wanting to share with my parents my situation, I was led through the process of emancipation into being able to make an adult decision. I went before a judge to request my being able to have an abortion without telling my parents. My advocate at the time coached me as to what to say in order to build compelling evidence that the involvement of my parents would cause them to throw me out of the house.

That was not true at all, they would not have done that. The judge sided with me though and agreed it was indeed in my best interest to have the abortion and not tell them anything about it. I went to the clinic, Meadowbrook in St. Louis Park, MN and the procedure took place. I was completely emotionally numb during the entire process. Matter of fact, it appeared that I was so in control and unaffected that when they (the administrative staff) insisted that I stay for a couple of hours and drink juice in order to insure that my blood lost didn't cause a fainting spell, I balked at the idea and resisted their suggestion. They didn't let me leave without first monitoring my blood pressure and heart beat in order to make sure I was "healthy" enough to go. I went home and pretended as if life was normal and I hadn't just terminated a life. That evening though, the cries of a baby, my baby would not let me sleep. The tormented screams that rang through my head over the next couple of weeks were too much to bear and I started drowning them in alcohol and drugs. Anything I could get my hands on in order to quiet the pain that echoed in my heart, my mind and my soul. A reckless endangerment of my own life ensued and I found myself in one promiscuous situation after another. I quit going to school and worked and partied full time instead. I couldn't bear the thought that everyone at my high school must know of what I had done. After numerous sexual encounters some that were not only unwelcome, but also violating, left their marks on my being to a point that my worth had nose-dived below zero. I met someone that paid enough attention to me most of the time and I was just 17, almost exactly but not quite a year after the abortion. We spent all of our time together and as a result I was pregnant again. Happy this time and excited about the future of a family we started planning the rest of our life together. This relationship though, was incredibly dysfunctional at best. The core elements of

needs being met were enough to keep us together despite the persistent chemical abuse that never seemed to go far enough away. In my sixth month of pregnancy, I was so depressed that the only thoughts that kept me from taking my own life were those of the new life growing inside of me. I had made a commitment and I was responsible for this baby growing inside of me, I felt obligated to stay alive for that reason alone. At the time, I didn't put it together, I didn't realize that my nagging feelings of little value and no worth were due to the fact that I had taken the precious life of my own child and I didn't know that my not feeling "good enough" to be alive was directly due to my abruptly stopping the life of my first child. My baby boy was born healthy and without complications even though I feared the worst due to my intermittent using throughout the pregnancy. This is difficult to admit, although important to reveal because I believe that even though I loved this life inside of me, I still hated the shell in which he was growing to the point of still trying to block out the pain from the loss of my first child which I was directly to blame for. I went in the other direction of extremes after he **[358]** was born and stopped eating and started working out obsessively to the point of passing out in the shower one day. I was not healthy internally, even though I had been clean and sober for months out of the fear of causing harm to my child. Things grew worse again at home and my boyfriend, my baby's father, ended up in jail just six short months after he was born. I was pregnant again and alone with an infant that was 100% my responsibility. I couldn't bear the thought of bringing another child into what seemed to be a fatherless world. I didn't seek counsel of friends or family. I was heavily into healthy alternatives and I searched high and low for a "natural out" to my horrifying situation. Nothing worked. I was still pregnant and alone and 18 years old with a baby and no sense of a secure future. I

made the decision to have an abortion against the request of the father who wanted to have our baby. It was simple and easy enough to make the appointment. As long as I had the cash, I could be rid of my problem and no questions asked this time by a judge or anyone else. It was my business and that is exactly what it turned into when the exchange of money for service took place. Little did I know that this experience would damage my soul and spirit as severely if not more than the first time. I still don't recall the procedure. I do recall though afterwards the emotional pain that came from making that decision. Once again I found myself overwhelmed by the realization that I was a murderer. I never really let it sink in, as soon as I felt even the closest sliver of pain, I was off and running to any kind of medication I could get my hands on in order to not feel anything at all. I succeeded in the pushing down of my emotional pain the point of it becoming seemingly non existent. On the outside, I was a knock out. In shape, beautifully put together and quite the personality. On the inside, I was a disaster waiting to happen. I didn't realize then that the effort it was taking to keep all of this at bay was actually demolishing my physical and spiritual being. I went on with life as I knew it and started going to school for court reporting, all went well for the most part, I was excelling amongst and over my peers with little effort on my part. The nagging incompleteness was easily rendered as a by product of my unhealthy relationship. We bought a house and shortly afterwards I was pregnant again. I so did not want to have a baby right then. I wanted to finish school and begin a career that I was really not suited for, but I wanted to finish anyway. I secretly hoped and prayed for a natural termination, even though I had not made a conscious connection to the previous pain of my earlier decisions, I just knew that I could not have another abortion. I was blessed with a baby girl. After her

birth, it was obvious that I would have to begin working full time in order to support our family due to the children's father not taking on his family obligations. I couldn't connect with this child. I was unable to get close to her in the sense of welcoming a new life into my world. It could easily be said that I resented having to care for a new life when my own was on it's way to becoming something of worth and validation. We struggled and I started to have complications physically with my reproductive system afterwards. I went in for ultrasounds, and the physicians found tumors on my ovaries, cysts. They didn't think that surgery was necessary, the pain though was excruciating and it would wake me up in the middle of the night. It felt as though a metal baseball bat had found it's way to shatter my pelvic region with such an impact that left me debilitated. I couldn't stand the obsessive preoccupation with another pregnancy anymore. I knew that I was obviously fertile and even though our relationship was incredibly rocky, the threat of another pregnancy was more than I could bear. I knew I didn't want to have any more children with this man and I also knew that if I ended up pregnant again I would be faced with yet **[359]** another horrifying decision to be made and I couldn't even fathom the thought of another abortion even though I was not connecting any pain to the previous ones at that time. I decided to shut down my reproductive system at the ripe old age of 21 years old. I realize now that in a desperate attempt to protect myself, I was also punishing myself for the past that still had it's grip on me. I was not in my eyes worthy to be a parent and even though to others, I was the model of a mother, I didn't feel that way inside. I felt that I had children on a loan and even though I loved them dearly, I still had this nagging feeling that they didn't belong to be because I didn't deserve them and therefore I couldn't allow myself to get too attached out of the fear that

they would be taken from me at anytime because I really shouldn't have them to begin with. There are numerous chapters that could be written in between the time that it took in order for me to realize that my horribly dysfunctional way of living was not what the rest of the world had encountered. After many years of abuse and tormented living with my children's father, I went from one relationship to another sheerly to validate my being worthy of another's affections. When I finally found my way into the real world of people that existed on their talents and education I realized that I had been gifted with several talents that can make a difference in our world. Those gifts though, as real as they are were not enough for me to believe in myself because I still suffered from an incredibly low self esteem and self image. The one that is offered up after numerous conversations with oneself speaking negatively about who they are and why they don't deserve to be the recipient of a life gone good. Self sabotage continued to wreak havoc on my being and I couldn't get a grip on the fact that I was driving the vehicle of my life. I still told myself that I didn't deserve to be happy and I didn't deserve to have and receive love and because I had murdered two of my children I certainly didn't deserve to live. Presented with opportunities to excel I would start out at a pace far above or at the very least right in with others that had seemingly far better upbringings and education. Again though the inward knowing gnawed at me on a level that was undetectable to bring into focus as to what was really wrong. I went from one achievement and failure brought on by my own doings after another. I packed up my children and left this state that I thought for sure was my downfall. We moved and started over five times before leaving Minnesota for what I hoped was for good. We moved to the state of Washington and even though I was very ill upon arrival, nothing would stop me from moving forward to a life

that I could create upon my own clean blank canvass. The children's father was in Washington as well with his new girlfriend and I leaned on them for support and they did the same except tenfold it seemed. Then it happened. I had returned home after five months to visit my only real love and after coming back from that weekend, I unraveled at a rate faster than a ball of twine being chased by a playful kitten. It was as if the three legged table that I set everything on so intricately balanced started to feel the weight of the world that it was no longer able to carry alone. I was alone and I was far away from any support that could have kept me teetering. I nosedived and went into what I now know was the beginning of post traumatic stress disorder. I was not in my mind anymore. It was as if I was suspended into the nothingness of the world that surrounded me and I fell apart. Bit by bit. Piece by piece. Even though I new that I couldn't be pregnant, I went to the Dr. for a pregnancy test because I felt life moving within me. What was happening though, was the surfacing of the life that I had at once felt 12 years prior. It was absolutely amazing the physical manifestation that was going on inside of me. I went on line to find out how to **[360]** get my tubal ligation reversed, and what the chances were of my actually being pregnant even though I was unable to physically carry it out. I had three very close friends within a two week period of time tell me they were pregnant and only one chose to continue with the pregnancy. The other two I begged and pleaded with, telling them that I would do anything at all in order to help them and I would even pack up and come home and take care of their babies in order to save them from death. They declined. I was heartbroken and then, as soon as it was decided, I could feel the literal deaths of these babies as I lay on my couch groaning and crying in pain, even though I was thousands of miles away, the connection was so strong. I found

myself in the shower bawling and grieving for these babies that were not allowed to live. It was a part of the journey that I needed to go through in order to reconcile my losses. It took a long time to get to the point of actualization. More trips home, and more of my mind lost, I couldn't make a decision to stay or come home. Finally all of it came to an abrupt end and I found myself after returning from a weekend in Minnesota, at home in my apartment in Washington and trying to get focused on the neglected tasks that came from overwork and too much travel. There was a knock on my door and it was a neighbor that I didn't know but had seen and he took advantage of my ill state of mind, I was vulnerable and it showed. The sense of powerlessness that had been so natural to me by then was on it's way to becoming another violation at the hands of a predator. I was drugged and sexually assaulted by this man. It was the earthshattering pinnacle of what sent me into a hospital for sanity and recovery. I was definitely going home. Obviously there are some details that could be included, however I think if you look at this from a higher level of comprehension, it would be safe to say that I allowed myself out of a state of desperation to be at the hands of one or many that could and did wreak havoc on my life. A pattern that seemed to be congruent with the rest of my life due to my inability to stand up and strong in situations that seemed to be out of my control. I relate all of this directly to my abortions. Sure there are other dysfunctional symptoms that surmounted from my life experiences, however I know without a doubt that there is a deep connection to my lack of stability due to my twisted state of mind even though to many I came across as having it all together. I came home to a place that reminded me of everything that I had ever done wrong in my life and decided that I needed to do something with those emotions that I had the natural gift of expressing. I wanted to act. Once again I

was implanted with yet another seed of the hope of healing. I didn't know it at the time of course, however when I auditioned for a play that depicted a woman's remorse after the decision to have an abortion, once again I was at the mercy of my emotions that had controlled my life without them ever being exposed for what they truly were. I was blessed with the excruciating task of extracting each and every devastating effect that my decisions had caused and the task was extremely painful however I have been healed and I am so grateful for and to God and His neverending quest of reaching out to me and allowing me to come to terms of this life that involved 15 years of harboring self hate and destruction. There is so much more to my story and I would love to share it all with you for the distinct purpose of halting this disgusting alternative to life. **[361]**

I have read the above and foregoing statement and the same is true and correct.

SIGNED this 10 day of December, 2001.

Please use my
- ☒ full name.
- ☐ initials only.

/s/ Tammy Dempsey
My signature evidences my authorization to use this affidavit for all purposes.

SUBSCRIBED AND SWORN TO before me, the undersigned authority, this 10 day of December, 2001.

/s/ Dani Pelzl
Notary Public

[672]

(Province)
The State of Manitoba

County of Canada

BEFORE ME, the undersigned authority, on this day personally appeared Shawna Jamieson (Print Name), who, being by me duly sworn, upon oath, stated the following facts:

"I am over the age of eighteen years, and I am of sound mind and competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit, and I do solemnly swear, or affirm, that the following facts are true:

1) Tell approximately when and where your abortion occurred: May 1985. Abortion Clinic in Grand Forks, ND.
2) Were you adequately informed of the nature and consequences of abortion, what it is, what it does? No. It was very impersonal. The doctor asked for the money. Approx. $275.00 and then had me lie on a table and leave right after the procedure. I was only 16 years old.
3) Were you informed of any link between abortion and breast cancer? No Have you had breast cancer? ____
4) Did anyone pressure you into have an abortion? No If so, who? _____
5) How has your abortion affected you? It has damaged my soul in a way that can never be healed. I was a young scared girl who got pregnant at 16 years old. I

panic[k]ed and when I contacted a hospital in Canada I was told I needed parental consent. My parents were going through a separation and I didn't want to burden my Mom so I was given the name of an abortion clinic in Grand Forks, N.D. who would do the procedure, no questions asked. I just wanted it to be over and told myself it wasn't a baby. I just chose not to think **[673]** about what I was going to do. The whole procedure was absolutely demoralizing and very unprofessional. But it was over and I could start over. Clean slate. Wrong! That was only the beginning of a long road of emotional pain I still struggle with. My child would have been born in January and every January I experience a depression and relive the experience over again. It was 17 years ago and I am facing my deepest valley regarding my pain over my abortion only now. It's not over and It will never be over. The pain is real and the loss is real. If only I had known what I was doing. The hardest thing for me to live with is to know that I willingly killed my baby. And it's a baby. I had my abortion at about 8 1/2 weeks. I have now been blessed with 2 healthy children. My daughter's ultrasound was given when she was 7 weeks (due to complications) and there was a heartbeat as clear as day. That confirmed her life for me and the doctors. She is now an energetic toddler full of life. I had a baby, full of life at 8 1/2 weeks, but I chose to end it's life and that is something I will have to live with for the rest of my life.

[672 cont'd]

6) How has your abortion affected others in your life? My mother just cried when I told her what I had done. She said if only we could have talked about it. Maybe things would have been different.

7) Based on your own experiences, what would you tell a woman considering an abortion? Having an abortion is not the easy way out. You can run but you can't hide. Maybe for a while, but not forever. The pain and the reality of what you did will come find you maybe 10 or 20 years later but it will come and when it does look out. Don't do it to yourself or your baby. You are worth more than that and you are loved.

8) Based on your own experience, what would you tell a court that believes abortion should be legal? It's easy to think that we are not really killing babies. I know. I felt the same way. But no one will ever convince me that the beating heartbeat of a 7 week old embryo is not a baby. I seen it. I felt it and I watched it grow. Medical technology helps us sustain life all the time and we are given medicines to help us live. A embryo is given a mother's womb **[673]** to help it live until it is strong enough to live on its own. How can we decide that one is ok and the other is not. Life is life, no matter how frail & weak it is. And what about the mother. How is it in the mother's best interests to suffer as I have suffered these past 17 years. It was (Abortion) to[o] available to a naive 16 year old girl who was never allowed to make an informed decision because of a legalized abortion clinic.

[672 cont'd]

"I have read the above and foregoing statement and the same is true and correct."

☒ I want to tell my story.
I understand that someone will contact me.

☐ Do not contact me.
☒ You may use my full name.
☐ Please use only my initials.

/s/ Shawna Jamieson
My signature evidences my authorization to use this affidavit for all purposes.

Print Your Full Name [redacted]
Address, City, & Zip

BELOW PORTION TO BE COMPLETED BY NOTARY:
SUBSCRIBED AND SWORN TO before me, the undersigned authority, this the 14th day of January, 2003.

NOTARY PUBLIC /s/ Dennis Alfred Smith

[771]

AFFIDAVIT

The State of Texas

County of Bexar

BEFORE ME, the undersigned authority, on this day personally appeared TIFFANY ANN KRUSE PIERCE, who, after being by me duly sworn, upon oath, stated the following facts:

"My name is TIFFANY ANN KRUSE PIERCE. I am over the age of eighteen years, and I am of sound mind and competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit, and I do solemnly swear, or affirm, that the following facts are true:

I was seventeen in January of 1989 and three weeks away from my eighteenth birthday at the time of my first abortion. I can say without a shadow of a doubt that if parental consent had been mandated by law back then, I would have been unable to abort my child. I went to a clinic on San Pedro Avenue in San Antonio, Texas. My doctor's name was Santoscoy. I got his name from another girl my age that had also had an abortion.

When I first realized that I was pregnant, I was very afraid. I first confided this information with my boyfriend. We made a pact at that time that we would not share this knowledge with anyone, especially our parents, until we had made a decision about what we were going to do -- together. I kept my end of the bargain but he ran home and told his parents. Not wanting

themselves or their child to be responsible for my child or me, they counseled him on how to persuade me to have an abortion. He did so very convincingly. I was asked to think about all that was before me in my life, graduation, college, career and all that I had to lose by having a child. And of course, there were my parents to think about. How would they deal with a single pregnant daughter? I would be letting them down dashing all of the dreams and aspirations that they held for my life. What about him, what did I expect from him and out of him? Did I really believe we were ready to be parents? Did I really want to give up all the experiences and fun that lied ahead? I guessed not.

I made an appointment on a weekday, Friday, I remember. I had a friend's mother write me an excuse note. I told her that I had another friend that needed to have an abortion and that she needed someone to go with her. She wrote me the note. My boyfriend was also going to skip school and take me to my appointment. We were going through this together after all, just he and I. He never showed, so I drove myself to the clinic. I parked my car, went inside, filled out the paperwork and waited to take my pregnancy test.

I recall thinking about not going through with it at this point. I was alone. I was scared. But, I didn't want to let anyone down. They called my name and handed me a cup into which I was to urinate. I had already taken a home pregnancy test, so I was certain of what the results would be. I went into the bathroom, past many other girls, and did as I was told. I remembering thinking to myself in the bathroom that there were no "women" in the clinic beyond the nurses and the receptionist, just girls. Soon, the nurse was telling me that my test was indeed positive (no big surprise) and that I needed to

follow her back to the counselor.

I was sat in front of a table that was already laid out with the materials they were about to present to me. The counselor asked if I understood that I was pregnant. Yes, I said. Than she asked if I understood that I was here seeking an abortion. Yes, I said. Then she began to explain to me that **[772]** although I was approximately 12 weeks pregnant that what was inside of me was nothing more that a small glob of flesh no larger in diameter than a half dollar coin. It was not alive yet, had no heartbeat or extremities. It was just a glob of flesh. She went on to describe the procedure as not much more than a DNC. She told me that I might feel some discomfort, but not much pain. I would be given a local anesthetic and that should more than ease any pain I might feel. She then showed me to the dressing room and handed me a hospital gown, explaining that the nurse would be back for me in a moment.

The rooms in the clinic were so cold. I remember shivering while I sat there waiting for the nurse. Before long, she came and got me and took me to the room where the doctor would perform the procedure. She put my legs up in stirrups and we both waited another minute or so for the doctor. When he arrived, he said nothing to me as he prepared. Finally, he broke the silence to say that I might feel a pinch and a slight sting as he administered the local. I was given the local and then he began the process. Not long into it, he turned on the pump. I did not know what it was at the time. He inserted a hose, I suppose, inside of me and began the pumping action. As I laid there, half-naked, feet in stirrups, with no one to hold my hand or ease my mind, I remember thinking that I was going to die. I had never felt such pain, nor have I since. I thought my entire insides were being sucked out. The counselor had left this

information out of her description of the procedure. I just knew I was going to die. God was going to kill me as I lied there. That was my punishment for being this stupid. When is it going to be over? When is he going to stop? I'm dying here and he doesn't even care. These were the things running through my mind as I turned my head and to my horror saw the pumping device, filled with the blood and parts of my baby. What had I done? I guess the nurse saw the pain in my face. She was kind enough to take my hand and tell me that it was almost over. There was sadness in her eyes, too.

Afterwards, they took me to an area filled with cots and I was able to "rest" until I was able to leave. They gave me juice and a cookie, I guess to level off my blood sugar and left me there, saying nothing to me from that point on. I was cramping and bleeding profusely, something else the counselor had left out about the procedure. I was given no pain medication of any sort. I stayed maybe fifteen minutes and then got up and drove myself to a friend's house. School was out for the day, so she was home. Knowing what I had been through that day, she took me to another friend's house where for the second time in my life I got stoned (on marijuana). It temporarily relieved the physical pain. Soon, my boyfriend came and picked me up.

I stayed at my boyfriend's house that night. His parents were out of town for the weekend, so I should have been able to get some rest and sleep. It was just supposed to be the two of us. Instead, he threw a party while I lay bleeding to death (I thought) on his parent's bed. It was a rough night. I was in a house full of people, but I spent the night alone.

Saturday morning, I got up, cleaned up and went home. From that point on, I went on as if nothing had happened to me.

I held everything inside. No one important in my life could know what I had done. It was to be secret forever, to death. The walls began to build up inside. It was the only way to keep my abortion a secret, to build walls. This was the first serious lie I had ever told to my parents. We drifted apart inside my heart but the facade never changed. They never suspected a thing. I would never let them. The more emotion I felt inside the more walls that went up to deal with them. Soon I wasn't feeling much of anything; the walls were now not just emotional. I began to party quite a bit. I did some drugs, and tried many others. I drank every weekend and the lies about my lifestyle began to build walls upon walls upon walls, until I couldn't see over them anymore. I had lost myself.

Later that year, my sister came to me. She believed she was pregnant and said she needed an abortion. I thought it was her boyfriend's but she had been gang raped. She didn't tell me that until many years later. I told her where to go but she wanted me to go with her. I did. While at the clinic, a mother of another sister's friend saw me. She told her daughter, who in turn told my sister. It did not take long **[773]** for her to confront me. Not wanting to divulge the true nature of my visit, I let her think she was right. For quite a while, she used that information against me every time she wanted to borrow my clothes or my car or my money.

Time went by and I was off to college. Not wanting to go through another abortion, I had gotten on the pill with the knowledge of my parents. The winters in Lubbock are cold and like most everyone else there I got sick with what I though was just a normal cold. It turned out to be strep throat. I went to the college clinic and they put me on antibiotics. No one explained to me that antibiotics lessen the effectiveness of the

pill. I got pregnant again. It was the same time of year as the last. I went to the same place, not knowing where else to go. This time I told no one until the deed was done. I took care of my "problem" over the Christmas/New Year break. The second abortion did not emotionally traumatize me like the first. The walls I had built were certainly doing their job.

Both of my pregnancies were from the same man, my boyfriend. After the first pregnancy, our relationship changed quite a bit. He had lost respect for me. He began cheating on me and treating me badly. He also began drinking heavily on a more regular basis. Looking back, I believe it was the beginning of his spiral downwards toward alcoholism. He has been sober now for about six years.

Well, it is 1991 now. I moved to Colorado to get away from the destructive relationship I was in with my boyfriend. He followed me there. It was very easy to fall back into old patterns with him. They were familiar and my self-esteem and self-worth issues wouldn't allow me much better. In April of that year I moved home to get away from him. Yet again, he came back to visit once. We slept together and bingo, I was pregnant once again. This time I made a different decision. I was going to have the baby. Out of respect for his role in the conception, I called to let my boyfriend know that I was pregnant, again and this time I was having he or she and "NO!" he did not have a say in what I was about to do with my body. He accepted the news rather well, I thought and said he was going to come home to be with me, soon. He did not come soon.

I told my mother I that I thought I was pregnant in the food court of our local mall. She took me in her arms and loved me

as only a mother could with forgiveness already in her eyes. We went to the closest pharmacy to get a test, so that we could make sure. Once we were home, I felt the need to purge as we waited for the results. I told here everything, each and every bit. I broke those walls that had been building inside of me for so long down, one by one that afternoon, until there was nothing left. We cried together and she held me tight as I revealed to her a side of her daughter that she had never known existed. When I was finished confessing, we went into the bathroom to check the results. I knew before I even took one step into that room that the test was positive. Having been pregnant twice before, I knew the feeling of being pregnant quite well.

We decided to make me a doctor's appointment to confirm our findings. The appointment was three days away. We would wait to tell my father and sisters until after the appointment. I made it one day. Without all those walls built up inside my emotions were no longer in check. The guilt of not sharing this possibility with my father was overwhelming. I called him at his office and asked if I could come in with my little sister and my mother. We drove to the office, sat down around his conference table and I looked at him with tears in my eyes and said, "Daddy, I'm pregnant". He just smiled at me and exclaimed, "Thank God, we get to go to Disneyland!" He got our pastor on the phone and we all prayed together. My pastor told me every birth, every single one, was a miracle of God and worthy of thankfulness and love. My love for those two men grew abundantly that day.

During the beginning of my prenatal care, I found out that I had type A negative blood. The abortion clinic never tested me and I could have very well bled to death without being given a

shot after each of my abortions. It was only by the grace of God that nothing ever happened to me. It was during **[774]** this time period that I saw what a fetus actually looks like at twelve weeks. The picture was quite different of the one shown to me at the clinic. In fact, a baby at the gestation age of twelve weeks has a brain complete with brainwaves, a heartbeat, appendages, fingers, toes and light/dark sensitive functioning eyes. To say the least, this information was quit[e] shocking to me since I had been told that this lump of flesh in no way was qualified to be called human life.

It wasn't long until the news of my pregnancy met my boyfriend's parents. Once again they took what was in their opinion a proactive role on behalf of their son. In a hotel room in South Bend, Indiana, my boyfriend's (who was an ex by this time) father tracked my father and I down. He and my father were having a heated telephone discussion when suddenly my father handed me the phone telling me that he wanted to speak with me now. When I said hello, he began to explain to me that if I did not agree to, at the very least, give this baby up for adoption or preferably have another abortion that he was going to tell my father everything about my life. I had already told my dad about my old lifestyle but my Mother and I had decided against telling him about the abortions. I put the phone down and covered the mouthpiece with my hand and told my father the rest of my story. He began to weep and blame himself for my bad decisions. He took the phone out of my hands and told my ex-boyfriend's father that under no circumstances were we going to abort or give this baby away. So, he told on me. At which time my father said to him, "I already know all the facts and that doesn't affect our decision in the least". My father went on to say that we wanted nothing from anyone in their family and that I, with my family's help, would raise this baby

on my own. The ex-boyfriend's father then began to insist on marriage. This, too, my father denied him. I was very blessed to have such a forgiving and loving and merciful father.

When I was about seven months along, the ex-boyfriend came back. I was already a different person by then. I lost most of my "friends" when I decided to have my baby. I was also quite reckoned with the fact that I was about to become a single mother. And most importantly, I had given my life to Jesus Christ, my Lord and Savior. I was no longer the weak-minded, drug-induced, no self-esteem girl that I had once been. I was confident and strong. This did not abide well with him since he was still knee deep in the party life style.

From the beginning, things were rough and by the time our child was eighteen months, he had enough and so had I. He left and went back to Boston, Massachusetts (which is where he was originally from) to live with his mother. His parents are divorced. His father and stepmother lived in San Antonio at the time and his mother in a suburb of Boston. He was now a raging alcoholic in the very essence of the meaning of the word. More than once, he tried to drink himself to death.

About this time, I began to feel very depressed. I had a lot of guilt concerning my abortions, as well as shame. I became suicidal. The only reason I did not kill myself was my child. As God always does, He got me through. Time went by quickly, as it tends to when you become a parent. My child was soon turning three. One day while driving home from work and preschool, she turned to me and said with authority and wisdom, "Mommy do you remember those first two times you didn't have me. Jesus and I cried for you in Heaven and we just want you to know how happy we are that we are a

family. We love you and forgive you." Watching her say this to me with my mouth gaping open, I then asked her, "What did you say"? She then replied, "You know what I said and what I mean. We forgive you and we love you." God spoke through my child to me to not only tell me that I was forgiven and that He loved me but also that this child was truly intended for me.

Not long before this, my ex-boyfriend had hit rock bottom and joined AA. Through AA, he, too, found Jesus. He called my father and they said the sinner's prayer together. From that point forward, he began to call our child at least once a week. He also began to badger me about giving him a second chance. One year later, I did. Today we are married and a complete family. **[775]**

Just before our wedding, God completely healed me of my post-abortion emotions. He also has used to me to reach other women with His message of complete forgiveness and mercy and, of course, grace. I have had the chance to counsel women dealing with their post-abortion emotions. In most cases (excluding some rape victims), these women all wish they could have the chance to make the decision over again. The pain and shame of abortion changes a woman like nothing else could. It makes her weak and it makes her hate herself in the end. Time does not heal the wounds of an abortion. It makes them worse. The only healing that I have found true for such despair is God. He too, lost his Son and understands the loss that these women feel once they have time to reflect upon what they have done and the price they paid for temporary freedom. Abortion creates an emotional prison for those that have experienced it, firsthand.

Without God, I shudder to think of where I might be today.

He has made me whole again. I no longer feel shame or guilt but I do still feel remorse. If I could go back and do it all over again, I would have had my child, the first time. If I could go out everyday and counsel women who were about to make the same mistake that I made, I would tell them of not only the physical pain that they will truly endure, but also the emotional pain, for it lasts much longer. I feel deep empathy for the women who have chosen abortion and live with the horrifying emotions that go hand in hand with that decision, who never find their loving Father in Heaven. I've lived with the regret and the shame. I've lived each day figuring the age of my dead children and imagining their faces, bodies, hair color, eye color and their personalities. It's only been the grace of God that's allowed me to live free of such things.

I was a Christian, raised in a Christian home by good, loving parents. I was a straight A student. I was a well adjusted teenage who was responsible and very rarely lied especially to my parents. I was a leader among my friends and to my sisters. I was someone who did not do drugs or ever drink in excess. I was a good person who always followed the rules until I had an abortion."

"I have read the above and foregoing statement and the same is true and correct."

SIGNED this the 13th day of September, 2000.

/s/ Tiffany Ann Kruse Pierce
TIFFANY ANN KRUSE PIERCE
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, this the

13th day of September, 2000.

/s/ Enriqueta Aguilar
NOTARY PUBLIC In and for
TEXAS

[992]

The State of Nevada

County of Clark

BEFORE ME, the undersigned authority, on this day personally appeared Christian M. Ongley (Print Name), who, being by me duly sworn, upon oath, stated the following facts:

"I am over the age of eighteen years, and I am of sound mind and competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit, and I do solemnly swear, or affirm, that the following facts are true:

1) Tell approximately when and where your abortion occurred: May 1993 Newport DE
2) Were you adequately informed of the nature and consequences of abortion, what it is, what it does? NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO!
3) Were you informed of any link between abortion and breast cancer? NO Have you had breast cancer? NO
4) Did anyone pressure you into have an abortion? Indirectly If so, who? My parents told me if I ever got pregnant they would kick me out of the house and my boyfriend expected me to have it done. My boyfriend wasn't there; his friend took me.
5) How has your abortion affected you? I grieved the loss/murder of my child so much that I would have preferred death. I wanted my baby back so desperately that I purposefully got myself pregnant and had twins

(March 19, 1995). One boy & one girl. It was psychologically more devastating than being molested and sexually abused by my biological father. The abortion will be with me for the rest of my life. I have already begun ingraining in my children that sex is for marriage and marriage alone. I always fear that I won't be able to have more children.

6) How has your abortion affected others in your life? My husband -- not my twin's biological father -- wonders the same. The father of my dead baby is haunted by her (the babies) death. He said he wishes I would have walked out. He said it was his biggest regret.
7) Based on your own experiences, what would you tell a woman considering an abortion? Even if it's rape -- give the baby up for adoption. If it's incest pray about it.
8) Based on your own experience, what would you tell a court that believes abortion should be legal? Explain to me why I was legally able to murder my child but if I had killed my father who had molested me at seven yrs of age and then sexually abused me when I was 12 to about 16 -- almost 17, I would have been sentenced. My baby did nothing wrong; my dad did.

"I have read the above and foregoing statement and the same is true and correct."

Yes! ☒ I want to tell my story. I understand that someone will contact me.

☐ Do not contact me.

☒ You may use my full name.

☐ Please use only my initials.

/s/ Christian Ongley

My signature evidences my authorization to use this affidavit for all purposes.

Print Your Full Name [redacted]
Address, City, & Zip

BELOW PORTION TO BE COMPLETED BY NOTARY:
SUBSCRIBED AND SWORN TO before me, the undersigned authority, this the 31 day of JAN, 2003.

NOTARY PUBLIC /s/ Lillian R. Wouters

[993]

The State of Nevada §
§
County of Clark §

Before me, the undersigned authority, on this day personally appeared Christian Marie Ongley (Print Name), who, being by me duly sworn, upon oath, stated the following facts:

My name is Christian Marie Ongley (Print Name). My address is [redacted]. I am over the age of eighteen years, and I am of sound mind and competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit, and I do solemnly swear, or affirm, that the following facts are true:

I grew up in a dysfunctional family. My dad sexually abused me for a fairly long time. Not until I realized he was hurting my sister in the same way did I decide to tell on him. However, it had stopped by the time I was 17; probably because I had a boyfriend with whom my parents found out I was having sex. Both my parents told me if I got pregnant they would kick me

out. Like most young kids I didn't think I would get pregnant so I didn't think I had a reason to worry about being kicked out. One evening I forced my boyfriend to talk to me about it. The issue had to be pressed; he didn't want to talk about the possibility that it could happen. In a matter of seconds, we both agreed that an abortion was the course of action we would take. Little did I know. . . .

On morning I woke up and felt nauseous as I rolled myself out of bed. I'm not sure how long it took me after this but my boyfriend bought me a pregnancy test, which left me unsure because the color was purple instead of pink as the directions said it would be. So I went back and purchased another one. This time I knew it was positive. It's "funny" how everything changed for me emotionally. Suddenly, I didn't want an abortion; it didn't seem as flippant and unimportant as it was made out to be. But I had to get one. What else could I do? I didn't want to get kicked out; and I didn't think my boyfriend would have anything to do with me if I had to go through it.

We had the day of the abortion planned out -- to keep it a secret from everyone. The Saturday of the abortion my boyfriend had baseball tryouts and thought he had the chance to be a starter. So I told my parents that me and his friend were going to follow him in the bus to tryouts. So the day of the abortion, his friend drove me to the clinic. It was pretty early in the morning. I don't even remember getting ready. The abortion experience was worse than being abused. I sat there in the waiting room which was smaller than I expected desiring to leave -- so desperately! But I felt trapped and alone. After sitting for about 45 mins., at least, I was taken into the office connected to the little lobby where I handed the man the cash for the "procedure." Then, I was ushered to the same room

again to wait even longer. Eventually, I was taken in to another room where the lady explained that I would get changed into a hospital gown. I don't remember much else said. It was a short meeting. I wasn't told about any risks involved or the specifics of what the "doctor" would do. From that room I was led down the short hall to an open waiting room -- much smaller -- on the left side where I changed into the gown behind a cloth dressing room. In what seemed like HOURS later, I was finally taken into a room with a doctors/hospital examining OB/GYN table. I think I remember being injected with something inside of me to cause numbness; but I'm not sure. Then I hear a very loud vacuum noise & the most immense, intense pain I have ever felt. The "procedure" lasted about 5 mins., probably. I was given some pink stuff to drink -- antibiotic I think. Then about 1 hr later I was discharged and still in a lot of pain. From the time I walked in the door to the time I walked out, I probably spent at least 5 hrs. there. I suffered the most emotionally. I hated myself, hated what I did & wanted my baby back! I know and still believe I'd of had a girl. It was the most bitter and depressing time of my life. No anguish can compare. I'll carry the scar with me for the rest of my life; even though I know I've been forgiven by God. There are days when I have to forgive myself all over again. Now I have twins -- boy & girl. I was so anguished I purposefully got pregnant when I was 19. They were born in '95 & will be 8 on March 19. I worry that when my husband & I want to try for our own that I won't be able to. Des & Eric (twins) are not his biological children. We pray that we will be blessed with 3 healthy children. After all God is so gracious & merciful & forgiving as shown me by my twins.

[994]

Please use my: ☒ full name.

/s/ Christian Marie Ongley

☐ initials only.

My signature evidences my authority to use this affidavit for all purposes.

SUBSCRIBED AND SWORN TO before me, the undersigned authority, this ____ day of 31st, 2003.

/s/ Lillian R. Wouters

Notary Public

(15)

No. 04-1144

Supreme Court, U.S.
FILED
AUG 8 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, AND JOHN M. THORP, JR., M.D. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Roe v. Wade, 410 U.S. 113 (1973) 4

Stenberg v. Carhart, 530 U.S. 914 (2000) 1, 4

United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997) 1

STATUTES

N.H. Rev. Stat. Ann. § 132:24-28 (2004) ..... *passim*

N.H. Rev. Stat. Ann. § 332-1:2 (2004) 14

MISCELLANEOUS

A. Gilchrist et al., *Termination of Pregnancy and Psychiatric Morbidity*, 167 BR. J. PSYCHIATRY 243 (1995) 9

Amy R. Sobie & David C. Reardon, *Detrimental Effects of Adolescent Abortion*, THE POST ABORTION REVIEW Vol. 9(1), Jan.-Mar. 2001, *at* http://www.afterabortion.info/PAR/V9/n1/teens_vs_older.htm (last visited Jul. 29, 2005) 9

Brent Rooney and Byron C. Calhoun, M.D., *Induced Abortion and Risk of Later Premature Births*, 8 J. AM. PHYSICIANS & SURGEONS 46 (Summer 2003) 11

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C. Ananth et al., *The Association of Placenta Previa with History of Cesarean Section and Abortion: A Meta-Analysis*, 177 AM. J. OBSTET. GYNECOL. 1071 (1997) 10

C. Morgan et al., *Suicides after Pregnancy*, (letter) 314 BMJ 902 (1997) 9

D.C. Reardon et al., *Deaths Associated with Pregnancy Outcome: A Linkage Based Study of Low Income Women*, 95 SOUTH. MED. J. 834 (2002) 8

Gissler, *Suicides after Pregnancy in Finland, 1987-94: Register Linkage Study*, 313 BMJ 1431 (1996) 9

J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D., Ph.D., and E.M. Shadigian, M.D., *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58(1) OB/GYN SURVEY 61 (2003) ..... *passim*

Joachim A. Martius et al., *Risk Factors Associated with Preterm (<37 + 0 weeks) and Early Preterm Birth (<32 + 0 weeks): Univariate and Multivariate Analysis of 106,345 Singleton Births from the 1994 Statewide Perinatal Survey of Bavaria*, 80 EUROPEAN JOURNAL OF OBSTETRICS AND GYNECOLOGY AND REPRODUCTIVE BIOLOGY 183 (1998) 11

M. McMahon et al., *Age at First Birth and Breast Cancer Risk*, 43 BULL. WORLD HEALTH ORGAN. 209 (1970) 12

March of Dimes, *Complications of Premature Birth*, at http://www.marchofdimes.com/prematurity/5512.asp (last visited Jul. 29, 2005) 11

TABLE OF AUTHORITIES – Continued

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Reviewing the Medical Evidence: Long-Term Physical and Psychological Health Consequences of Induced Abortion, U.S. Senate Subcomm. on Sci., Tech. and Space, Statement of Elizabeth M. Shadigian, M.D. (March 3, 2004) 8, 9, 10, 11, 12

W. Chie et al., *Age at Any Full-Term Pregnancy and Breast Cancer Risk*, 151 AM. J. EPIDEMIOLOGY 715 (2000) 12

INTEREST OF *AMICI CURIAE*[1]

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a nonprofit organization dedicated to defending the practice of private and ethical medicine. Founded in 1943, AAPS has thousands of members nationwide in all specialties. AAPS frequently participates in litigation in defense of the practice of medicine, in accordance with the Oath of Hippocrates. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (frequently citing AAPS submission). The mission of AAPS includes ensuring that patient consent to medical procedures is voluntary and fully informed, and that the legal standard for judicial review of legislation applies in a consistent manner to all medical procedures.

John M. Thorp, Jr., M.D. is the Mcallister Distinguished Professor of Obstetrics and Gynecology at the University of North Carolina, Chapel Hill School of Medicine. He has an active practice in obstetrics and gynecology with over 4000 patients, both women and minor patients. Dr. Thorp serves as Co-Director of the North Carolina Program for Women's Health Research. In that capacity, he has conducted research on the health effects of induced abortion on women's health, and served as lead author of the peer-reviewed study that forms the basis of this brief: J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D.,

---

[1] Pursuant to Sup. Ct. R. 37.6, *amici* state that none of the counsel for the parties authored this brief in whole or in part. Monetary contribution to the preparation of this brief provided in part by the Alliance Defense Fund. Pursuant to Sup. Ct. R. 37.3(a), the parties have consented to the filing of this brief. Letters of consent are being filed with the Clerk.

Ph.D., and E.M. Shadigian, M.D., *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58(1) OB/GYN SURVEY 67 (2003).

Dr. Thorp has an extensive research history including key roles in more than 45 major funded studies, including a prospective cohort of pregnancy outcomes that is in its third cycle of federal funding. Dr. Thorp is a productive author with more than 100 peer-reviewed publications, 20 commentaries, and 12 book chapters to his credit. Of note, he is an experienced editor and peer reviewer, who reviews for journals ranging from the *New England Journal of Medicine* to *Pediatric and Perinatal Epidemiology*, with a special interest in advancing the quality of the literature in women's health. He was recently honored by the editors of *Obstetrics and Gynecology* as among their most valued reviewers.

In the interest of protecting the long-term health of minors seeking abortion who would benefit from parental guidance regarding medical history and follow-up preventative care, *Amici Curiae*, the AAPS and John M. Thorp, Jr., M.D., seek to inform this Court of the serious long-term health risks that minors are subject to following induced abortion.

SUMMARY OF THE ARGUMENT

Amici offer this brief for the limited purpose of establishing the medical realities surrounding the long-term impact on the health of minors obtaining abortion, especially absent the parental guidance that the New Hampshire Parental Notice Prior to Abortion Act encourages. *Amici* therefore present this Honorable Court with a

summary of long-term health risks of induced abortion that impact both minors and adult women as presented in a 2003 peer-reviewed systematic review article co-authored by *Amicus Curiae* Professor John M. Thorp, Jr., M.D.[2] The review article found that induced abortion is associated with an increased long-term risk of:

1) suicide and self-harm;
2) placenta previa;
3) preterm birth; and
4) breast cancer due to loss of protective effect of first full-term pregnancy.

The opportunity of parents to be notified of their minor daughter's future abortion serves the important medical interests of helping the minor assess her medical history in relation to abortion health risks; seeking preventative measures due to increased post-abortion health risks if the decision is made to have the abortion; or completely avoiding the increased post-abortion health risks if parental guidance results in a decision to continue the pregnancy to term.

The district court's sweeping, wholesale invalidation of the New Hampshire Parental Notice Prior to Abortion Act[3] ("the New Hampshire Act") could have devastating consequences on the long-term health of minor girls who undergo abortion, especially without the preventative

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[2] J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D., Ph.D., and E.M. Shadigian, M.D., *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58(1) OB/GYN SURVEY 67 (2003) ("the OGS Review") (*see* Appendix).

[3] Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2004).

health measures following abortion that parental notice encourages.

Even assuming *arguendo* that a health exception is constitutionally required, the lower courts' overbroad relief in striking the New Hampshire Act even in the vast majority of its constitutional applications has the effect of endangering the long-term health of minor girls who obtain abortions without parental guidance regarding medical history and follow-up preventative medical care.

ARGUMENT

I. UPHOLDING NEW HAMPSHIRE'S PARENTAL NOTICE ACT WILL PROTECT MINORS SEEKING ABORTION FROM SERIOUS LONG-TERM PHYSICAL AND PSYCHOLOGICAL HEALTH CONSEQUENCES

Concern for women's health has been a significant and constant theme in this Court's abortion jurisprudence.[4] This concern is no less important for minors than for adult women. Statutes designed to encourage parent-daughter communication, such as the New Hampshire Act, promote the health of minors seeking abortions because the opportunity of parents to be notified of their minor daughter's future abortion serves important medical interests, such as:

- helping the minor assess her medical history in relation to abortion health risks,

[4] *Roe v. Wade*, 410 U.S. 113, 162 (1973); *Doe v. Bolton*, 410 U.S. 179, 192 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 837 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000).

- providing follow-up preventative medical care in relation to increased health risks if the minor undergoes the abortion, or
- avoiding the minor's post-abortion health risks if parental guidance results in a decision to continue the pregnancy to term.

Because of the importance of accurate medical history before a possible abortion, as well as preventative health measures following an abortion, parental guidance for minors seeking abortion can be critical to a minor's future health. Thus, upholding parental notice statutes serves to protect minors' health at least as much as striking down such statutes for alleged defects related to minors' health.

A. The Overbroad Relief of Invalidating the New Hampshire Act Rather than Severing Purported Unconstitutional Applications Endangers the Health of Minors Seeking Abortion

The lower courts erred by granting the overbroad remedy of striking down the entire parental notice statute. The error is blatant even assuming *arguendo* that a maternal health exception is necessary because the lower courts' decisions afforded respondents more relief than they are entitled to.

By striking down the New Hampshire Act, rather than simply severing the purported unconstitutional *application* of the rare circumstance in which the statute

requires notice during medical emergencies,[5] the courts' rulings make it more likely that minors' health will suffer.

The district court's sweeping, wholesale invalidation of the New Hampshire Act may have devastating consequences on the long-term health of minor girls who undergo abortion, due to the lack of preventative health measures following abortion that parental notice encourages.[6] It is these medical risks that *amici* wish to bring to this Court's attention as it decides the fate of the New Hampshire Act.

---

[5] While the district court briefly addressed and rejected severability of *provisions* of the statute, neither the district court nor the appeals court followed the legislative intent to sever unconstitutional *applications* as expressed in N.H. Rev. Stat. § 132:28 (Supp. 2004). For a complete analysis of the "severability of application" argument, see *Brief Amicus Curiae of the Thomas More Society in Support of Petitioner*, at Argument II.

[6] "Certain decisions are considered by the State to be outside the scope of a minor's ability to act in his own best interest or in the interest of the public, citing statutes proscribing the sale of firearms and deadly weapons to minors without parental consent, and other statutes relating to minors' exposure to certain types of literature, the purchase by pawnbrokers of property from minors, and the sale of cigarettes and alcoholic beverages to minors. It is pointed out that the record contains testimony to the effect that children of tender years (even ages 10 and 11) have sought abortions. Thus, a State's permitting a child to obtain an abortion without the counsel of an adult 'who has the responsibility or concern for the child would constitute an irresponsible abdication of the State's duty to protect the welfare of minors.'" *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 72-73 (1976) (citation omitted).

B. A Major Medical Review Article Finds Serious Long-Term Health Consequences of Induced Abortion

The following information is based on a 2003 peer-reviewed abstract of abortion-related health studies over the first thirty years of legalized abortion entitled *Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence*, by J.M. Thorp, Jr., M.D., K.E. Hartmann, M.D., Ph.D., and E.M. Shadigian, M.D., 58(1) OB/GYN SURVEY 67 (2003) ("the OGS Review") (*see* Appendix).[7]

The OGS Review evaluated over sixty international studies that included more than one million women. The study's authors are:

John M. Thorp, Jr., M.D., Mcallister Distinguished Professor of Obstetrics and Gynecology, Department of Epidemiology, School of Public Health, and Department of Obstetrics and Gynecology, School of Medicine, University of North Carolina, Chapel Hill; Co-Director of the North Carolina Program for Women's Health Research.

Katherine E. Hartmann, M.D., Ph.D., Assistant Professor, Department of Epidemiology, School of Public Health, and Department of Obstetrics and Gynecology, School of Medicine, University of North Carolina, Chapel Hill; Co-Director of the North Carolina Program for Women's Health Research.

Elizabeth Shadigian, M.D., Clinical Associate Professor, Department of Obstetrics and Gynecology, School of Medicine, University of Michigan, Ann Arbor.

---

[7] OGS Review, *supra* note 2, at 67-79.

The OGS Review is a systematic review article that evaluated long-term risks of induced abortion. The study concluded that induced abortion is associated with increased risks of the following long-term physical and psychological health conditions: serious mental health disorders/suicide, placenta previa, preterm birth and breast cancer due to loss of protective effect of first full-term pregnancy.[8]

i. Suicide and Self-Harm

One of the most dramatic and disturbing tabulations of the OGS Review is the increased risk of death by suicide. In addition to a variety of mental health disorders including depression, two studies, one from the United States and the other from Finland, have shown startling increased rates of suicide following abortion.[9] This phenomena is not seen after miscarriage.[10]

The United States study showed that women who had abortions were **2.5 times** more likely to die from suicide.[11] The Finland study showed that women who had abortions

[8] *Id.* The OGS Review also concluded that induced abortion did *not* result in increased risk of the following: infertility, miscarriage, tubal or ectopic pregnancy. OGS Review, *supra* note 2.

[9] *Id.* at 74. *See also, Reviewing the Medical Evidence: Long-Term Physical and Psychological Health Consequences of Induced Abortion*, U.S. Senate Subcomm. on Sci., Tech. and Space, Statement of Elizabeth M. Shadigian, M.D. (March 3, 2004) ("Shadigian Senate Testimony").

[10] OGS Review, *supra* note 2, at 74 (miscarriage referred to medically as "spontaneous abortion").

[11] *Id.* at 73, n. 96 (Table 7, ref. n. 96, citing David C. Reardon et al., *Deaths Associated With Pregnancy Outcome: A Linkage Based Study of Low Income Women*, 95 SOUTH. MED J. 834, 841 (2002).

were **3.1 times** more likely to die from suicide than non-pregnant women and **6.5 times** more likely to die from suicide than women who completed their pregnancy.[12]

Of particular significance to the case at issue, the Finland study showed that *teenagers* who have abortions are **two to four times** more likely to commit suicide compared to women who have abortions in adulthood.[13]

In addition, self-harm is more common in women who have undergone induced abortion.[14] In England, psychiatric hospital admissions because of suicide attempts are three times more likely for women after induced abortion, but not before.[15]

The OGS Review concluded that regardless of whether there is a causal link, the observation of the association "suggests careful screening and follow-up for depression and anticipatory guidance/precautions for women who choose elective abortion."[16] The need for parental involvement for minors takes on paramount importance in light

[12] *Id.* at 73, n. 90 (Table 7, ref. n. 90, citing Gissler, *Suicides after pregnancy in Finland, 1987-94: Register Linkage Study,* 313 BMJ 1431 (1996).

[13] Amy R. Sobie & David C. Reardon, *Detrimental Effects of Adolescent Abortion*, THE POST ABORTION REVIEW Vol. 9(1), Jan.-Mar. 2001, *at* http://www.afterabortion.info/PAR/V9/n1/teens_vs_older.htm (last visited Jul. 29, 2005).

[14] Shadigian Senate Testimony, *supra* note 9 (citing the OGS Review at 74, n. 97 (A. Gilchrist et al., *Termination of Pregnancy and Psychiatric Morbidity*, 167 BR. J. PSYCHIATRY 243 (1995))).

[15] *Id.* (citing the OGS Review, *supra* note 2, at 74, n. 93 (C. Morgan et al., *Suicides After Pregnancy*, (letter) 314 BMJ 902 (1997))).

[16] OGS Review, *supra* note 2, at 76.

of these real life dangers to the mental well-being of minors considering or undergoing abortion.

ii. Placenta Previa

The medical condition where the placenta covers the cervix, making a cesarean section necessary to deliver the baby, is called "placenta previa."

When pregnancies are complicated by placenta previa, the result is high rates of preterm birth, low birth weight babies, and infant death.[17] Women who develop this condition are also at an increased risk for blood loss, subsequent blood transfusions, and hysterectomies (loss of the uterus) which thus require more extensive surgery.[18]

All of the three studies that have been done with over 100 subjects and one meta-analysis found a positive association between induced abortion and placenta previa. The OGS Review concluded that induced abortion increases the risk of placenta previa in subsequent pregnancy by **approximately 50%**.[19]

iii. Preterm Birth

The major cause of "perinatal [infant] mortality and neurological long-term morbidity" in industrialized nations

[17] *Id.* at 70, n. 27 (citing C. Ananth et al., *The association of placenta previa with history of cesarean section and abortion: A meta-analysis*, 177 AM. J. OBSTET. GYNECOL. 1071 (1997).

[18] Shadigian Senate Testimony, *supra* note 9; OGS Review, *supra* note 2, at 70.

[19] OGS Review, *supra* note 2, at 70, 75.

is preterm birth.[20] The OGS Review found twenty-four studies that explored the connections between induced abortion and preterm birth or low birth weight.[21] "Twelve studies found an association which almost **doubled** the risk of preterm birth. Moreover, seven of the twelve identified a higher risk for preterm birth for women who have had more abortions."[22]

A pregnancy resulting in preterm birth for a woman who had an abortion as a minor can result in tragic medical conditions for her subsequently born infant. The elevated risk of preterm birth can result in newborns suffering from a variety of health problems and disabilities including, among other things, cerebral palsy,[23] incomplete lung development, and sight or hearing problems for the infant due to underdeveloped eyes or ears.[24]

[20] *Id.* at 70, n. 70 (citing Joachim A. Martius et al., *Risk Factors Associated with preterm (<37 + 0 Weeks) and Early Preterm Birth (<32 + 0 Weeks): Univariate and Multivariate Analysis of 106, 345 Singleton Births from the 1994 Statewide Perinatal Survey of Bavaria*, 80 EUROPEAN JOURNAL OF OBSTETRICS AND GYNECOLOGY AND REPRODUCTIVE BIOLOGY 183 (1998)).

[21] OGS Review, *supra* note 2, at 70; Shadigian Senate Testimony, *supra* note 9.

[22] OGS Review, *supra* note 2, at 70.

[23] Brent Rooney and Byron C. Calhoun, M.D., *Induced Abortion and Risk of Later Premature Births*, 8 J. AM. PHYSICIANS & SURGEONS 46, 47 (Summer 2003).

[24] March of Dimes, *Complications of Premature Birth*, at http://www.marchofdimes.com/prematurity/5512.asp (last visited Jul. 29, 2005).

iv. Breast Cancer: Loss of Protective Effect of First Full-Term Pregnancy

Since the 1970's, medical literature has shown that there is a "protective effect of a first full-term pregnancy" early in one's reproductive life.[25] "Protective effect" means that when a pregnancy is brought to term, a woman's risk of breast cancer is reduced as compared to women who have not given birth. When a minor undergoes an induced abortion, she is losing this protective effect and this decision can almost **double her lifetime risk of breast cancer**.[26]

The OGS Review thus concluded that "it is clear that a decision to abort and delay pregnancy culminates in a loss of protection with the net effect being an increased risk."[27] The OGS Review further concluded that women should be given informed consent about the increased risk of breast cancer related to the "**undisputed** protective effect of a full-term delivery early in one's reproductive life."[28]

[25] Shadigian Senate Testimony, *supra* note 9 (citing M. McMahon et al., *Age at First Birth and Breast Cancer Risk*, 43 BULL. WORLD HEALTH ORGAN. 209 (1970) (as cited in OGS Review, *supra* note 2, at 75 n. 101)); *See also* W. Chie et al., *Age at Any Full-Term Pregnancy and Breast Cancer Risk*, 151 AM. J. EPIDEMIOLOGY 715 (2000) (cited in the OGS Review, *supra* note 2, at 75 n. 98).

[26] OGS Review, *supra* note 2, at 76.

[27] *Id.* at 68 (abstract).

[28] *Id.* at 75 (emphasis added). Note that the "loss of protective effect of first full-term pregnancy" risk factor is separate and distinct from studies that assess whether induced abortion is an "independent risk factor" for breast cancer. "Loss of protective effect" compares the increased risk of women who have undergone abortion to women who have given birth. By contrast, the "independent risk factor" compares women who have undergone abortion with women who have not been pregnant at all. This brief focuses on the risk of breast cancer due to

(Continued on following page)

The OGS Review concluded that "a young woman facing an unwanted pregnancy can and should be informed of the loss of that protection that would derive from a decision to terminate her pregnancy and delay having a baby."[29] The authors demonstrated that a decision of an 18 year old pregnant woman to terminate her pregnancy "can almost double her 5-year and lifetime risk of breast neoplasia at age 50."[30]

The review article stated that "the 'loss of protection' effect is **most pronounced in women under 20 years of age who elect to undergo abortion** rather than continue their pregnancy."[31] The OGS Review authors thus concluded "that clinicians are obliged to inform pregnant women that a decision to abort her first pregnancy may almost double her lifetime risk of breast cancer through loss of the protective effect of a completed first full-term pregnancy earlier in life."[32]

CONCLUSION

The long-term increased risks of minors undergoing abortion are real and hazardous. Understanding the increased risk for mental health problems, placenta previa, preterm birth and breast cancer due to loss of protective effect requires a level of understanding and

"loss of protective effect" that results when a minor aborts her first pregnancy because that significant increased risk is "undisputed." *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 76 (emphasis added).

[32] *Id.*

sophistication that most minors lack.[33] Parental involvement is needed in order to help make this important decision. If it is decided that the minor undergo an abortion, continued parental involvement and monitoring is necessary in order to best address possible long-term risks.

By law, a New Hampshire patient undergoing a medical procedure must provide informed consent to that procedure.[34] If a minor cannot fully understand or appreciate the possible long-term consequences of an induced abortion, then one can logically conclude that absent parental involvement fostered by the New Hampshire Act, the minor can never truly consent to the procedure.

Minors need help in understanding health consequences when making such a serious and irrevocable decision. The New Hampshire Act is a significant step in aiding pregnant minors in this process.

For the foregoing reasons, *Amici Curiae,* the Association of American Physicians and Surgeons and Professor

[33] *See* note 6, *supra*.

[34] N.H. Rev. Stat. Ann. § 332-1:2 (2004).

John M. Thorp, Jr., M.D., respectfully request this Honorable Court to reverse the judgment of the Court of Appeals.

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August 8, 2005

The following is the official abstract of the OGS Review. A .pdf version of the entire article is posted for the Court's review at the following internet address, with the permission of John M. Thorp, Jr., MD: ***www.BDFund.org/OGS Review.pdf***

Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence

Obstetrical & Gynecological Survey. 58(1):67-79, January 2003. *Thorp, John M. Jr., MD; Hartmann, Katherine E. MD, PhD; Shadigian, Elizabeth MD*

Abstract:
Induced abortion is a prevalent response to an unintended pregnancy. The long-term health consequences are poorly investigated and conclusions must be drawn from observational studies. Using strict inclusion criteria (study population >100 subjects, follow up >60 days) we reviewed an array of conditions in women's health. Induced abortion was not associated with changes in the prevalence of subsequent subfertility, spontaneous abortion, or ectopic pregnancy. Previous abortion was a risk factor for placenta previa. Moreover, induced abortion increased the risks for both a subsequent preterm delivery and mood disorders substantial enough to provoke attempts of self-harm. Preterm delivery and depression are important conditions in women's health and avoidance of induced abortion has potential as a strategy to reduce their prevalence. Only review articles including the single published meta-analysis exploring linkages between abortion and breast cancer were relied upon to draw conclusions. Reviewers were mixed on whether subsequent breast neoplasia can be linked to induced abortion, although the sole meta-analysis found a

summary odds ratio of 1.2. Whatever the effect of induced abortion on breast cancer risk, a young woman with an unintended pregnancy clearly sacrifices the protective effect of a term delivery should she decide to abort and delay childbearing. That increase in risk can be quantified using the Gail Model. Thus, we conclude that informed consent before induced abortion should include information about the subsequent risk of preterm delivery and depression. Although it remains uncertain whether elective abortion increases subsequent breast cancer, it is clear that a decision to abort and delay pregnancy culminates in a loss of protection with the net effect being an increased risk.

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IN THE

Supreme Court of the United States

KELLY A. AYOTTE,
ATTORNEY GENERAL OF NEW HAMPSHIRE,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICAE CURIAE* MAUREEN L. CURLEY AND OTHER WOMEN ATTESTING TO THE IMPORTANCE OF PARENTAL NOTIFICATION FOR THE ABORTION DECISION OF MINORS IN SUPPORT OF PETITIONER

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Dated: August 8, 2005

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Francoeur v. Piper, 776 A.2d 1270 (N.H. 2001) 20

H.L. v. Matheson, 450 U.S. 398 (1981) 5, 13, 16, 17

Hodgson v. Minnesota, 497 U.S. 417 (1990) 13, 16

In Re Fasi, 567 A.2d 178 (N.H. 1989) 20

McCorvey v. Hill, 125 S. Ct. 1387 (2005) (No. 04-967) 11n

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 11

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 12

Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 16

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 5, 12, 17

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 13-14, 15, 16

Planned Parenthood v. Heed, 390 F.3d 53 (1st Cir. 2004) 19, 21

Roe v. Wade, 410 U.S. 113 (1973) 12, 16

Roper v. Simmons, 125 S.Ct. 1183 (2005) 13n-14n

State v. L'Heureux, 846 A.2d 1193 (N.H. 2004) 21

Stenberg v. Carhart, 530 U.S. 914 (2000) 22

STATUTES:

N.H. Rev. Stat. Ann. 132:25-I (a) 18n
N.H. Rev. Stat. Ann. 132:26-I (a) 22
N.H. Rev. Stat. Ann. 132:26 II (b),(c) 19
N.H. Rev. Stat. Ann. 627:1 20
N.H. Rev. Stat. Ann. 627:3 22
N.H. Rev. Stat. Ann. 627:3 I 19

MISCELLANEOUS:

Amaro *et al.*, *Drug Use Among Adolescent Mothers: Profile of Risk*, 84 Pediatrics 144 (1989) 9

American Society of Anesthesiologists, "Frequently Asked Questions," at http://www.asahq.org/patient Education/otherfaqs.htm (last visited August 3, 2005) 24

Angelo, *Psychiatric Sequelae of Abortion: The Many Faces of Post-Abortion Grief*, 59 Linacre Q. 69 (1992) 10n

Campbell *et al.*, *Abortion in Adolescence*, 23 Adolescence 813 (1988) 10

Centers for Disease Control and Prevention, *Abortion Surveillance – United States, 2001 (Morbidity and Mortality Weekly Report)* 24

Centers for Disease Control and Prevention, *Unintended and Teen Pregnancy Prevention: Teen Pregnancy, at* http://www.cdc.gov/ reproductivehealth/UnintendedPregnancy/Teen.htm (last modified April 12, 2005) 4

Centers for Disease Control and Prevention, *Abortion Surveillance – United States, 2001 (Morbidity and Mortality Weekly Report)* 4 at http://www.cdc.gov/mmwr/PDF/ss/ss5309.pdf. (last visited August 3, 2005) 24

Coleman *et al.*, *State-funded Abortions vs. Deliveries: A Comparison of Outpatient Mental Health Claims over Five Years*, 72 Am. J. of Orthopsychiatry, 141 (2002) 6

Coleman *et al.*, *History of Induced Abortion in Relation to Substance Use During Pregnancies Carried to Term*, 187 Am. J. of Obstetrics & Gynecology 1673 (2002) 8-9

Cougle *et al.*, *Generalized Anxiety Following Unintended Pregnancies Resolved Through Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth*, 19 J. of Anxiety Disorders137 (2005) 7

Cougle *et al.*, *Depression Associated with Abortion and Childbirth: A Long-term Analysis of the NLSY Cohort*, 9 Med. Sci. Monitor 105 (2003) 6

David, Rasmussen, and Holdt, *Post-abortion and Postpartum Psychotic Reactions*, 13 Fam. Planning Perspectives 32 (1981) 6

FDA Alert, *at* http://www.fda.gov/cder/drug /infopage/mifepristone/default.htm, (last modified July 22, 2005) 25n

Frank *et al.*, *Cocaine Use during Pregnancy, Prevalence and Correlates*, 82 Pediatrics 888 (1988) 9n

Franz & Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 Adolescence 161 (1992) 7

Garfinkel *et al., Stress, Depression and Suicide: A Study of Adolescents in Minnesota,* Responding to High Risk Youth 43-55 (Minnesota Extension Service, University of Minnesota) (1986) 10-11

Gissler *et al., Suicides after Pregnancy in Finland: 1987-94: Register Linkage Study*, 313 Brit. Med. J. 1431 (1996) 9, 10

Grimes, *Second-Trimester Abortions in the United States*, 16 Fam. Planning Perspectives 260 (1984) 10n

Klassen & Wilsnack,. *Sexual Experience and Drinking among Women in a U.S. National Survey,* 15 Arch. Sexual Behavior 363 (1986) 9n

Major *et al., Psychological Responses of Women After First-Trimester Abortion*, 57 Archives of Gen. Psychiatry 777 (2000) 8

Morgan *et al., Suicides After Pregnancy: Mental Health May Deteriorate as a Direct Effect of Induced Abortion*, 314 Brit. Med. J. 902 (1997) 10

Ney & Wickett, *Mental Health and Abortion: Review and Analysis*, 14 Psychiatric J. Univ. of Ottawa 506 (1989) 5n

Planned Parenthood, *How Abortion is Performed*, at http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/abortion/fact-abortion -provided.xml 24

Reardon *et al.*, *Psychiatric Admissions of Low Income Women following Abortion and Childbirth*, 168 Can. Med. Ass'n J. 1253 (2003) 6

Reardon *et al.*, *Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low-Income Women*, 95 So. Med. J. 834 (2002) 9

Reardon & Ney, *Abortion and Subsequent Substance Abuse*, 26 Am. J. Drug & Alcohol Abuse 61 (2000) 8

Rosenfeld, *Emotional Responses to Therapeutic Abortion*, 45 Am. Fam. Physician 137, 138 (1992) 7

Sim & Neisser, *Post-Abortive Psychoses: A Report from Two Centers*, in The Psychological Aspects of Abortion (David Mall & Walter F. Watts eds., 1979) 10n

Söderberg & Sjöberg, *Emotional Distress following Induced Abortion: A Study of its Incidence and Determinants among Abortees in Malmö, Sweden*, 79 Eur. J. of Obstetrics & Gynecology 173 (1998) 7

Speckhard, The Psycho-Social Stress Following Abortion (Kansas City, Mo.: Sheed & Ward, 1987) 10n

Wilsnack *et al.*, *Women's Drinking and Drinking Problems: Patterns from a 1981 National Survey*, 74 Am. J. of Pub. Health 1231 (1984) 9n

WomensHealthChannel, *Teen Pregnancy, at* http://www. womenshealthchannel.com/teenpregnancy/index.shtm (last visited July 27, 2005) 4

Zolese & Blacker, *The Psychological Complications of Therapeutic Abortion*, 160 Brit. J. of Psychiatry 742 (1992) 7

INTEREST OF *AMICAE CURIAE*[1]

Amicae, who are listed and described in the Appendix, are women who attest to the importance of parental notification for minors contemplating abortion. They include (i) women who were pregnant before the age of eighteen and experienced the need for a parent's guidance, (ii) women medical professionals who have studied and treated the adverse psychological effects of abortion on women, and (iii) mothers who were unable to provide guidance and support to their pregnant daughters when they were contemplating abortion because they were not aware of their daughters' crisis pregnancies. All of these women believe that minors contemplating abortion, regardless of their ultimate decisions, benefit from parental notification. *Amicae* believe that parental notification protects the health and psychological well-being of pregnant minors by giving parents an opportunity to provide their pregnant daughters with guidance and support at a critical time in their lives.

SUMMARY OF ARGUMENT

The choices facing a pregnant minor are stark and potentially life-altering. On the one hand, the teen can choose to give birth; on the other, she can choose to abort. Both decisions are momentous and fraught with physical, emotional, and psychological consequences that can last well into adulthood. Minor children who become teen mothers are more likely to drop out of high school and live in poverty, more

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[1] Counsel for both parties have consented to the filing of this *amicus* brief. Their written consents are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. The Pro-Life Legal Defense Fund, Inc., contributed the printing costs associated with the preparation and submission of this brief. Unless otherwise noted, all statements made by *amicae* are on file with counsel for *amicae curiae*.

likely to experience premature labor, and more likely to give birth to babies that suffer health and developmental problems, such as low birth weights. Those who abort their pregnancies also face serious health consequences. In particular, they are more likely to experience mental and emotional problems, more likely to commit suicide, more likely to develop substance abuse problems, and more likely to face future risks of pregnancy complication than women who give birth.

Recognizing these health consequences surrounding a teenager's abortion decision, New Hampshire exercised its power to protect the health of its minors by seeking to involve their parents in abortion-related decisions when it enacted the Parental Notification Prior to Abortion Act ("the Act") in 2003. In so doing, New Hampshire is treading lightly; rather than requiring parental consent as many other States have done, New Hampshire merely requires parental notice. This notice helps to support the minor's decision-making process with parental guidance and information. Where parental notification is impossible or undesirable, New Hampshire provides for around-the-clock access to its courts for judicial bypass, with courts statutorily required to push other business aside and rule promptly in the minor's best interests (including potentially appointing a guardian *ad litem* to protect the child's best interests). By these measures, New Hampshire has established a policy that its minors should not undergo abortion without the involvement of an adult (either a parent, the court, or a court-appointed guardian) who will protect her best interests before she undergoes what is usually a surgical procedure. For emergencies, the Act contains an express exemption for abortions needed to save the life of a patient. Furthermore, it is subject to New Hampshire's statutory justification defenses, which preclude criminal and civil liability for any physician urgently acting to prevent serious harm to the pregnant minor, including harm to her health.

The First Circuit invalidated New Hampshire's efforts to protect the health of its pregnant minors, ostensibly out of concern for the health of those same pregnant minors. In particular, the First Circuit found the Act unconstitutional because it lacks an express exception permitting abortions for emergencies that threaten a patient's health, but not her life.

The absence of an express health exception does not render the Act unconstitutional. Rather, the Act does not impose an undue burden on the right to abortion because the Act plainly provides for emergency situations *already* (by providing around-the-clock court access), and because it is subject to New Hampshire's statutory justification defense if a situation is so urgent that resorting to the courts would endanger the minor's health. In any case, there is absolutely no evidence to suggest that there ever could be a real-world health emergency that is at once so severe as to require an immediate abortion without using the emergency judicial bypass procedure, and yet is not so severe as to endanger the patient's life or qualify for the justification defense. Moreover, New Hampshire's judgment that *some* adult should be involved before a doctor performs surgery on a minor for non-life-threatening conditions is eminently reasonable, and is well within the state's power to protect the health of its citizens.

ARGUMENT

I. BOTH TEEN PREGNANCY AND ABORTION CARRY SIGNIFICANT HEALTH RISKS.

A. Teen Pregnancies Carry Health And Other Risks For Both Pregnant Minors And Their Babies.

While pregnancy avoids many of the physical and psychological health problems associated with abortion (*see infra*), teen pregnancies are associated with significant consequences for both mother and baby. According to the Centers for Disease Control: "When teens give birth, their future prospects decline. Teen mothers are less likely to complete high school, more likely to be single parents, and more likely to live in poverty than other teens." Centers for Disease Control and Prevention, *Unintended and Teen Pregnancy Prevention: Teen Pregnancy, at* http://www.cdc.gov/reproductivehealth/UnintendedPregnancy/Teen.htm (last modified April 12, 2005).

Moreover, "[t]here are health risks to the baby and children born to teenage mothers are more likely to suffer health, social, and emotional problems. There is an increased risk for complications such as premature labor during teen pregnancy and socioeconomic consequences as well." WomensHealthChannel, *Teen Pregnancy, at* http://www.womenshealthchannel.com/teenpregnancy/index.shtm (last visited July 27, 2005).

B. Abortion Carries Significant Physical And Psychological Health Risks, Especially For Minors.

This Court has long recognized that abortion carries significant health risks. *See, e.g., H.L. v. Matheson*, 450 U.S. 398, 411 n.20 (1981) ("Abortion is associated with an increased risk of complication in subsequent pregnancies."); *id.* (noting "the emotional and psychological effects of the pregnancy and abortion experience" and citing their potential "considerable harms" to minor women); *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992) (citing the "devastating psychological consequences" that can flow from an uninformed abortion decision).

Recent studies provide further evidence that abortion can have both short-term and long-term negative psychological consequences for women, especially adolescent women.[2] In particular:

1. Abortion increases the risk of mental health problems.

Recent epidemiological studies have found that women who have abortions are more likely to require treatment for mental health disorders, such as depressive psycho-

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[2] Of particular note are the increasing number of epidemiological studies that show an association between abortion and adverse effects, such as suicide, psychiatric admission, and self-harm. These studies are particularly significant because they use large sample sizes, collect data from objective outcome measures (e.g., suicide) rather than subjective outcome measures (e.g., patient self-reports), and use medical records that link a history of abortion with other health issues. In contrast, many earlier studies of the mental health status of women after abortion rely on small sample sizes and experience high drop-out rates. Ney & Wickett, *Mental Health and Abortion: Review and Analysis*, 14 Psychiatric J. Univ. of Ottawa 506 (1989).

sis, neurotic depression, bipolar disorder, adjustment reactions, and schizophrenic disorders, than women who give birth. One recent study of the medical records of 56,741 low-income patients in California found that women who had abortions were 2.6 times more likely than women who gave birth to be hospitalized for psychiatric treatment in the first ninety days following abortion or delivery. Reardon *et al., Psychiatric Admissions of Low-Income Women following Abortion and Childbirth*, 168 Can. Med. Ass'n J. 1253 (2003); *see also* David, Rasmussen, and Holdt, *Post-abortion and Postpartum Psychotic Reactions*, 13 Fam. Planning Perspectives 32 (1981) (study of 98,612 women in Denmark found that the psychiatric admission rate was 18.4 per 10,000 women after abortion versus 12 per 10,000 women after childbirth). Women who had abortions were also more likely to be hospitalized during the four-year period examined. Reardon *et al., supra.*

Another recent epidemiological study of the medical records of 173,000 low-income patients in California found that women who had abortions were sixty-three percent more likely to receive outpatient psychiatric treatment within ninety days of an abortion than women who gave birth. Coleman *et al., State-funded Abortions vs. Deliveries: A Comparison of Outpatient Mental Health Claims over Five Years*, 72 Am. J. of Orthopsychiatry, 141 (2002). During the four-year period examined, women who had abortions were also more likely to be hospitalized.

Additionally, women who abort a first pregnancy are at greater risk of long-term clinical depression, compared with women who carry a first pregnancy to term. Cougle *et al., Depression Associated with Abortion and Childbirth: A Long-term Analysis of the NLSY Cohort*, 9 Med. Sci. Monitor 105 (2003) (study of 1,884 women who participated in National Longitudinal Survey of Youth between 1980 and 1992). Younger women are especially at risk of adverse psy-

chological consequences after abortion. Zolese & Blacker, *The Psychological Complications of Therapeutic Abortion*, 160 Brit. J. of Psychiatry 742 (1992); Franz & Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 Adolescence 161 (1992).

2. Abortion increases the risk of emotional problems.

Women who have abortions are also more likely to experience emotional distress than women who give birth. One study found that women who aborted their unintended first pregnancies and had no prior history of anxiety were thirty percent more likely to subsequently report all the symptoms of generalized anxiety disorder (GAD) than those women who had carried their unintended first pregnancies to term. Cougle *et al., Generalized Anxiety Following Unintended Pregnancies Resolved Through Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth*, 19 J. of Anxiety Disorders137 (2005) (study analyzing nationally representative sample of 10,847 women aged 15-34). Teenagers in particular were more likely than adults to experience anxiety. *Id.* Additionally, research has shown that "teenagers who do not tell their parents about their abortion have an increased incidence of emotional problems and feelings of guilt." Rosenfeld, *Emotional Responses to Therapeutic Abortion*, 45 Am. Fam. Physician 137, 138 (1992).

Another study of 854 Swedish women following their abortions found that more than fifty percent of the women reported experiencing emotional distress. Söderberg & Sjöberg, *Emotional Distress following Induced Abortion: A Study of its Incidence and Determinants among Abortees in Malmö, Sweden*, 79 Eur. J. of Obstetrics & Gynecology 173 (1998). This distress was classified as severe, requiring pro-

fessional psychiatric treatment, among sixteen percent of the women. *Id.* Likewise, a study of women up to two years after their abortions found that twenty percent reported depressed moods and negative emotions because of their abortions. Major *et al.*, *Psychological Responses of Women After First-Trimester Abortion*, 57 Archives of Gen. Psychiatry 777 (2000). Their negative emotions regarding the abortion increased over time while their satisfaction with their decision decreased over time. *Id.*

Some women also experience post-traumatic stress disorder (PTSD) after abortion. *Id.* (study of 442 women found that 1% reported PTSD within two years of abortion); Catherine Barnard, The Long-Term Psychological Effects of Abortion, Portsmouth N.H.: Institute of Pregnancy Loss (1990) (study found that 18.8% of women who had abortions reported experiencing all of the symptoms of PTSD three to five years after their abortions, and almost 50% reported experiencing multiple symptoms of PTSD).

3. Abortion increases the likelihood of future substance abuse.

Women who have abortions are also at greater risk of abusing drugs and alcohol than women who give birth. A recent study found that women who have an abortion are five times more likely to report subsequent substance abuse than women who give birth. Reardon & Ney, *Abortion and Subsequent Substance Abuse*, 26 Am. J. Drug & Alcohol Abuse 61 (2000) (study of a random sample of 700 women, ages 24 to 44). Additionally, women with a prior history of abortion are twice as likely to use alcohol, five times more likely to use illicit drugs, and ten times more likely to use marijuana during the first pregnancy they carry to term, compared with other women delivering their first pregnancies. Coleman *et al.*, *History of Induced Abortion in Relation to Substance*

Use During Pregnancies Carried to Term, 187 Am. J. of Obstetrics & Gynecology 1673 (2002) (study of nationally representative sample of 2,613 women who had recently given birth).[3]

Research has also identified an association between abortion and drug and alcohol abuse among adolescent women. Amaro *et al.*, *Drug Use Among Adolescent Mothers: Profile of Risk*, 84 Pediatrics 144 (1989).

4. Abortion increases the risk of suicide.

Finally, studies also suggest that women who have abortions, particularly minors who have abortions, are more likely to commit and attempt suicide than women who give birth and non-pregnant women.

Recent epidemiological studies linking the medical and death records of large samples of women have shown that suicide rates are three to six times higher for women who have abortions than for women who give birth. Gissler *et al.*, *Suicides after Pregnancy in Finland, 1987-94: Register Linkage Study*. 313 Brit. Med. J. 1431 (1996) (national study of women in Finland found that women who had abortions were 6.5 times more likely to commit suicide than women who had given birth); Reardon *et al.*, *Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low-Income Women*, 95 So. Med. J. 834 (2002) (study of

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[3] Further studies also show a link between abortion and substance abuse. *E.g.*, Wilsnack *et al.*, *Women's Drinking and Drinking Problems: Patterns from a 1981 National Survey*, 74 Am. J. of Pub. Health 1231 (1984); Frank *et al.*, *Cocaine Use during Pregnancy, Prevalence and Correlates*, 82 Pediatrics 888 (1988); Klassen & Wilsnack, *Sexual Experience and Drinking among Women in a U.S. National Survey*, 15 Arch. Sexual Behavior 363 (1986).

173,279 women who had state-funded abortions or deliveries found that women who had abortions were 3.1 times more likely to die from suicide compared to women who gave birth). Morgan *et al.*, *Suicides After Pregnancy: Mental Health May Deteriorate as a Direct Effect of Induced Abortion*, 314 Brit. Med. J. 902 (1997) (study of women in Wales found suicide much more likely for women who had abortions as compared with women admitted for normal delivery).[4]

The risk of suicide following an abortion is particularly high among adolescent women. Compared to adult women, adolescents are more than twice as likely to attempt suicide following an abortion. Campbell *et al.*, *Abortion in Adolescence*, 23 Adolescence 813 (1988). Adolescents who abort are also more likely to commit suicide than adolescent women in general. Gissler *et al.*, *Suicides after Pregnancy in Finland: 1987-94: Register Linkage Study*, 313 Brit. Med. J. 1431 (1996). A survey study of Minnesota high school students also found that adolescent women were ten times more likely to attempt suicide in the six months after an abortion than adolescents who did not have abortions. Garfinkel *et al.*, *Stress, Depression and Suicide: A Study of Adolescents in Minnesota*, Responding to High Risk Youth 43-55

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[4] Clinical case studies and self-reports of women who have had abortions also indicate a correlation between abortion and subsequent suicides and attempted suicides. *See generally* Angelo, *Psychiatric Sequelae of Abortion: The Many Faces of Post-Abortion Grief*, 59 Linacre Q. 69 (1992). *See also* Grimes, *Second-Trimester Abortions in the United States*, 16 Fam. Planning Perspectives 260 (1984); Sim & Neisser, *Post-Abortive Psychoses: A Report from Two Centers*, in The Psychological Aspects of Abortion (David Mall & Walter F. Watts eds., 1979); Anne Speckhard, The Psycho-Social Stress Following Abortion (Kansas City, Mo.: Sheed & Ward, 1987).

(Minnesota Extension Service, University of Minnesota) (1986).[5]

II. THE STATE MAY CONSTITUTIONALLY ACT TO PROTECT THE HEALTH AND PSYCHOLOGICAL WELL-BEING OF MINORS BY REQUIRING PARENTAL NOTIFICATION.

In light of the profound health consequences that arise from a minor's abortion decision, it is no surprise that this Court has repeatedly found that States may act to protect minors' health and welfare by requiring involvement of parents in abortion decisions.

A. States Have Constitutional Authority To Regulate Abortion To Protect Physical And Psychological Health.

This Court has long recognized that where regulations concern how best to protect the health of citizens, the States should be permitted great latitude to make their own judgments. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474 (1996) (internal citations omitted) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, . . . matter[s] of local concern, the States traditionally have had great latitude under their police powers to legislate as to the protection of lives, limbs,

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[5] More detailed information about the negative psychological consequences of abortion for women is available in "The Impact of Abortion on the Public Health and Welfare", a paper by psychiatric nurse Maureen L. Curley, which collects much of the research set forth above. A copy of the Curley article was submitted with the Brief of Amici Curiae Maureen L. Curley *et al.* at Appendix, *McCorvey v. Hill*, 125 S. Ct. 1387 (2005) (No. 04-967).

health, comfort, and quiet of all persons."); *see also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

This power includes the power to regulate abortion to protect women's physical and psychological health. *Roe v. Wade* emphasized the State's interest in protecting the pregnant woman's health. 410 U.S. 113, 162 (1973). *See also Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) ("As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion."). This Court has upheld various regulations motivated by such concerns, from licensing standards for abortion facilities, *see, e.g., Roe*, 410 U.S. at 163, to more general requirements tailored to inform the woman's free choice by communicating to her the risks of abortion, *see, e.g., Casey*, 505 U.S. at 881-84 (upholding an informed consent provision).

This Court has expressly acknowledged that psychological well-being is a component of the woman's health for the purposes of abortion regulation. *See, e.g., Doe v. Bolton* 410 U.S. 179, 192 (1973); *see also Casey*, 505 U.S. at 882 ("it cannot be questioned that psychological well-being is a facet of health"). In *Casey*, for example, the Court stated:

> In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.

Id.

B. States May Constitutionally Require Parental Notification Prior To A Minor's Abortion.

This Court has long recognized that the right of minors to choose abortion raises special concerns, and that States have a legitimate interest in trying to protect the health of minors by bringing parents and guardians into the decision-making process.

1. Minors require special protection.

This Court has recognized two principal concerns about minors choosing abortion without a parent's or guardian's involvement. First, minors may be ill-suited to make mature and informed choices about abortion without parental guidance. Second, minors may be uniquely vulnerable to deleterious psychological consequences of a poor decision.

The Court's recognition of the incapacity of some minors to make the abortion decision without parental guidance dates back to 1976 and *Planned Parenthood v. Danforth*:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physi-

> cians at an abortion clinic, where abortions for pregnant minors frequently take place.

428 U.S. 52, 91 (1976) (Stewart, J., concurring).

The Court has echoed this sentiment several times over the past thirty years. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"); *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely"); *id.* at 459 ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotions or peer pressure than is an adult").

Furthermore, the negative consequences of poor abortion choices—which this Court recognized as potentially "devastating" in *Casey*—fall particularly heavily on minors. *See H.L. v. Matheson*, 450 U.S. 398, 411 n.20 (1981) ("The emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under 18 than in adults. Because of these considerable harms to minor women, combined with their general lack of capacity to grant effective consent, regulation in the context of minor women is especially needed to protect their interests in health and psychological well-being.");[6] *see also* pp. 9-11

[6] The Court's concern about the decision-making ability of minors, of course, extends well beyond the realm of abortion. As this Court observed last Term in *Roper v. Simmons*, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and . . . often result in impetuous and ill-considered actions

supra (noting that minors who have abortions are more likely to attempt or commit suicide).

2. Parental notification laws are a constitutional means of protecting the health and psychological well-being of minors considering abortion.

This Court has repeatedly found that parental consent laws are a legitimate way for a State to protect the physical and psychological health of pregnant minors from the potential health issues arising from a teenager's abortion decision. As this Court explained in *Bellotti*, 444 U.S. at 640:

> As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns.

(internal citations omitted). *See also Danforth*, 428 U.S. at 102-03 (Stevens, J., concurring in part and dissenting in part) ("The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. . . . Whatever choice a pregnant young woman makes—to marry, to abort, to bear her

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and decisions . . . . In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." 125 S.Ct. 1183, 1195 (2005) (internal citations omitted).

child out of wedlock—the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational."); *Matheson*, 450 U.S. at 411 ("As applied to immature and dependent minors, the statute plainly serves the important considerations of . . . protecting adolescents. . . . The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature."); *see also Danforth*, 428 U.S. at 102 ("the holding in *Roe v. Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision").

In permitting parental involvement statutes, this Court has recognized that States may rely on the expectation that most parents will act in the best interests of their child. *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 520 ("It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature. The statute in issue here is a rational way to further those ends."); *see also Hodgson*, 497 U.S. at 484 ("A State may seek to protect and facilitate the parent-child bond on the assumption that parents will act in their child's best interests."); *Matheson*, 450 U.S. at 424 (Stevens, J., concurring in the judgment) ("The possibility that some parents will not react with compassion and understanding . . . does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision."). The State's efforts to encourage such parent-child discussions are particularly necessary

because, as this Court recognized in *Casey*, "children will often not realize that their parents have their best interests at heart." 505 U.S. at 895.

Similarly, this Court has noted that parental involvement in the abortion decision is invaluable for more than the support and guidance it provides. Parents can also supply important medical information that bears directly on the contemplated abortion — information that may not otherwise be weighed in determining what is truly best for the minor. *See Matheson*, 450 U.S. at 411:

> In addition, as applied to that class, the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

(internal note omitted); *see also amica* Eve Sanchez Silver, Appendix, *infra* at 4a. Thus, the Court has recognized the obvious proposition that minors are better cared for when parents are included in their medical decisions.

III. NEW HAMPSHIRE'S DECISION TO PROTECT THE HEALTH AND WELFARE OF ITS PREGNANT MINORS THROUGH PARENTAL NOTIFICATION SHOULD NOT BE INVALIDATED BY THE ABSENCE OF AN EXPRESS HEALTH EXEMPTION.

The First Circuit's ruling is largely premised on its theory that there might be situations in which the absence of an express health exemption would impose an undue burden for pregnant minors in need of an abortion. This view fails to appreciate key aspects of the Act and New Hampshire law, which make the Act well-suited to protect the health and welfare of New Hampshire's minors.

A. New Hampshire's Around-The-Clock Judicial Bypass System Adequately Protects The Health Of Pregnant Minors Facing Health Emergencies.

The First Circuit suggested that a pregnant minor faced with an emergency might be forced to wait fourteen days for judicial bypass. This is simply incorrect.

First, the Act only requires a wait of forty-eight hours after giving notice.

Second, the Act waives the forty-eight hour wait for life-threatening emergencies.

Third, in the event that a non-life-threatening[7] health emergency exists that requires an abortion in less than forty-

[7] Emergencies that threaten the minor's life are expressly excepted under the Act. N.H. Rev. Stat. Ann. 132:25-I (a). Therefore, the only emergencies that are even arguably unprotected by the Act are those that do *not* threaten the life of the patient.

eight hours, New Hampshire's judicial bypass process offers *immediate* relief. For such emergencies, New Hampshire has statutorily required that its courts (a) be open and available for bypass petitions around the clock, seven days a week; (b) push all other matters on the calendar aside; and (c) "reach a decision promptly and without delay so as to serve the best interests of the pregnant minor." N.H. Rev. Stat. Ann. 132:26 II (b), (c). There is simply no reason to believe that courts would not obey the statutory mandate to decide promptly in the best interests of the minor, and instead take up to two weeks to decide while a minor's health was at risk. Indeed, the only plausible reason for New Hampshire's requirement that its courts be available twenty-four hours a day and seven days a week is precisely that New Hampshire expects those courts to be able to act immediately in emergency situations. By excepting death emergencies and requiring readily available judicial bypass for health emergencies, the Act adequately protects the health of New Hampshire minors.

B. New Hampshire's Justification Statute Provides A Complete Defense To Both Criminal And Civil Liability For Physicians Performing Abortions Necessary To Avoid Substantial Harms To A Minor's Health.

The First Circuit correctly recognized that New Hampshire's "competing harms" justification defense, N.H. Rev. Stat. Ann. 627:3 I, "has the potential to protect against criminal liability under the Act." *Planned Parenthood v. Heed*, 390 F.3d 53, 61 (1st Cir. 2004). However, that court *incorrectly* asserted that the justification defense "cannot preclude civil liability." *Id.* Likewise, the First Circuit expressed concerns about the justification statute's use of an objective reasonableness standard (as opposed to a subjective

good faith analysis), and held that the justification statute would not apply to offenses defined *after* the enactment of the justification statute. Each conclusion is incorrect.

First, New Hampshire law expressly provides that any justification defense that protects against criminal liability also provides a complete defense to civil liability based on the same action. In particular, N.H. Rev. Stat. Ann. 627:1 makes clear:

> Conduct which is justifiable under this chapter constitutes a defense to any offense. *The fact that such conduct is justifiable shall constitute a complete defense to any civil action based on such conduct.*

N.H. Rev. Stat. Ann. 627:1 (emphasis supplied); *In Re Fasi*, 567 A.2d 178, 181 (N.H. 1989) ("Thus, the defense of justification is an exculpatory defense which, if proved, not only results in a finding of no criminal liability, but also relieves a defendant of any civil liability which might attach to the particular conduct in question.").

The lower court's concern about a reasonableness standard leaving doctors "uncertain" about their actions, 390 F.3d at 61, is likewise misplaced. Whether or not the Act is in effect, New Hampshire doctors are *always* subject to reasonableness standards for their actions as a result of malpractice and negligence law. *See Francoeur v. Piper*, 776 A.2d 1270, 1275 (N.H. 2001) ("The defendant in a medical negligence case is measured against the standard of reasonable professional practice."). Thus, every action a doctor takes, at any time, is judged by a reasonableness standard. Moreover, requiring doctors to act reasonably — especially if they are performing emergency surgical procedures, without the involvement of any parent or guardian on a minor whose life is *not* in danger — is hardly an "undue" burden.

The First Circuit's concern about the applicability of the justification defense to later-enacted laws, 390 F.3d at 62, is likewise baseless. After recognizing that the justification defense had the potential to protect against liability, the First Circuit explained that, because the Act was enacted subsequent to the justification statute, the justification statute does not apply. There is absolutely no reason to believe that New Hampshire's justification statute is inapplicable to offenses defined after 1973 (the effective date of the statute, which essentially codified the common law of justification or necessity). To the contrary, New Hampshire's Supreme Court has recognized the applicability of the justification defense to offenses defined *after* the enactment of the justification statute. *See State v. L'Heureux*, 846 A.2d 1193 (N.H. 2004) (recognizing justification defense for offense of driving with a blood alcohol level over .08, which was not made an offense in New Hampshire until 1993). To hold otherwise would suggest that, by going to the effort of codifying the common law of justification, New Hampshire meant to *reduce* its scope but neglected to say so. The far more logical explanation is that (as *L'Heureux* demonstrates) the justification statute is a general background principle of law that applies to all offenses unless the legislature expressly says otherwise.

C. New Hampshire's Efforts To Protect The Health Of Pregnant Minors Should Not Be Trumped Where There Is No Evidence Of Any Medical Situation That Would Require The Health Exemption.

Neither the First Circuit nor Respondents present evidence that there could ever be a health emergency requiring an immediate abortion that is not adequately addressed under New Hampshire law.

First, unlike the law at issue in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Act does not prohibit any type of abortion; rather, it merely requires notice to parents and a forty-eight hour delay after notice (or resort to judicial bypass). Thus, the class of health emergencies for which an exemption could be needed is necessarily limited to those health emergencies that are (a) so urgent that the forty-eight-hour delay would be detrimental to the minor's health, and (b) so urgent that resort to the around-the-clock emergency judicial bypass procedure would be detrimental to the minor's health.

Furthermore, the health emergency requiring immediate abortion would also need to be an emergency that is *not* severe enough as to threaten the patient's life. If it were so severe, it would come under the life exception of N.H. Rev. Stat. Ann. 132:26-I (a).

Finally, the health emergency would also have to be *not* severe enough as to qualify under the "competing harms" defense of N.H. Rev. Stat. Ann. 627:3. Alternatively, if one sees the First Circuit's fears of the reasonableness standard as valid, the emergency would have to be of so borderline a nature that a licensed abortion provider would be uncertain whether performing the emergency abortion would be viewed as reasonable.

In sum, the class of health emergencies that would require an additional exemption would include only that narrow and hypothetical situation where a pregnant minor arrived at her doctor's office with a condition such that (a) waiting forty-eight hours for notice would be detrimental to her health, and (b) taking advantage of around-the-clock judicial bypass would be detrimental to her health, but simultaneously and paradoxically (c) is *not* so severe an emergency as to endanger her life, and (d) is *not* so clearly an

emergency that the provider would know that his or her conduct would be judged reasonable in the circumstances.

There is simply no evidence that so bizarre a health emergency could possibly exist; neither the lower courts nor the Respondents appear to have identified how such an emergency could actually occur.[8] Accordingly, New Hampshire's efforts to protect its pregnant minors from real, actual health consequences should not be trumped by the First Circuit's speculation about purely hypothetical health emergencies for which there is no evidence at all.

D. The Constitution Does Not Prohibit New Hampshire's Judgment That Input Of A Parent Or Guardian Is Desirable Before Surgery Is Performed For A Non-Life-Threatening Condition.

The First Circuit and the Respondents both suggest that New Hampshire's policy of encouraging parental or judicial involvement in the abortion decision should yield where the minor faces a health emergency. But these situations demonstrate precisely why New Hampshire's law makes sense: when faced with the prospect of emergency surgery for a non-life-threatening condition, it is critical that a minor have some responsible adult — whether it be a par-

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[8] The prospect of such a hypothetical, imaginary set of circumstances being used to facially invalidate a law is precisely why *Salerno*'s "no set of circumstances" test is sensible. Indeed, the opponents of the New Hampshire law are relying on a notion that is *exactly the opposite* of *Salerno*: While *Salerno* counsels that a law should be facially valid if it can be constitutionally applied in some set of circumstances, this law's opponents wish it to be invalidated solely because it *might* be applied unconstitutionally in a completely imaginary circumstance. If this were the standard, virtually all laws could be vacated; it is not difficult to imagine that any given law might hypothetically be applied in a racially discriminatory manner, for example.

ent, the court, or a court-appointed guardian as authorized under the Act—assigned to help protect her best interests.[9]

Most abortions are surgical and require general or local anesthesia. *See, e.g.*, Centers for Disease Control and Prevention, *Abortion Surveillance – United States, 2001 (Morbidity and Mortality Weekly Report)* 4 ("For women whose type of procedure was adequately reported, 95% of abortions were known to have been performed by curettage (which includes dilatation and evacuation [D&E])...") at http://www.cdc.gov/mmwr/PDF/ss/ss5309.pdf. (last visited August 3, 2005); *see also* Planned Parenthood, *How Abortion is Performed, at* http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/abortion/fact-abortion-provided.xml (noting that "gentle suction curettage" is a method of surgical abortion, is the "usual" means of early abortion, and that anesthesia is generally used). While surgery and anesthesia are generally safe, they do carry some irreducible risks of complication, infection, and even death. *See, e.g.*, American Society of Anesthesiologists, *Frequently Asked Questions, at* http://www.asahq.org/patient Education/otherfaqs.htm#2 ("All operations and all anesthesia have some risks, and they are dependent upon many factors including the type of surgery and the medical condition of the patient.") (last visited August 3, 2005).

These risks also pertain to abortions. According to the Centers for Disease Control and Prevention, there were 11 abortion-related deaths in the United States in 2000. *See* Centers for Disease Control and Prevention, *Abortion Surveillance – United States, 2001 (Morbidity and Mortality Weekly Report)* at 7 ("In 2000, a total of 11 women died as a result of legal induced abortion . . . ."). Likewise, even chemical abortions—for example, RU-486—appear to carry

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[9] This is especially true where the plaintiffs and the lower courts are asserting that the provider's judgment should not even be judged by a reasonableness standard.

some risk of infection and death.[10] New Hampshire is not constitutionally prohibited from requiring that, for *non*-life-threatening emergencies, either a parent or the court should be notified to help decide whether incurring such risks for a *non*-life-threatening condition is in the minor's best interests. In this regard, the Act serves New Hampshire's legitimate interest in protecting the health of pregnant minors.

E. Reliance On Justification Statutes Would Remove A Principal Point Of Dispute Between Pro-Life And Pro-Choice Citizens And Public Servants Concerning Most Regulations Of Abortion.

Lastly, this case offers the Court a rare but important opportunity to use its decision to de-escalate the country's continuing battle over abortion. Generally speaking, legislatures that enact laws lacking health or life exceptions do not do so out of cruelty or indifference to women. Rather they do so out of concern that some abortion providers will use a subjective standard to effectively negate the law with an overly broad definition of medical emergency. Generally speaking, those who argue in favor of life and health exceptions usually do not claim that abortion can never be regulated, but rather seek an effective provision for real emergency situations, so that a woman's life or health are not harmed by the regulation.

The common law provides a logical and effective response that addresses the legitimate concerns on both sides, and on which all citizens rely to protect their life and liber-

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[10] *See, e.g.*, FDA Alert, *at* http://www.fda.gov/cder/drug/infopage/mifepristone/default.htm, (last modified July 22, 2005) ("FDA is aware of four women in the United States who died from sepsis (severe illness caused by infection of the bloodstream) after medical abortion with Mifeprex and misoprostol.").

ties every day: the justification or necessity defense. Unlike the "good faith" standard feared to be easily abused and practically unenforceable, a justification defense would carry an objective standard of reasonableness. That is the same objective standard of reasonableness on which all citizens rely when they need a fellow citizen to make a common-sense judgment to help them in an emergency, for example by running a red light to get to the hospital, or by attacking a would-be murderer or hijacker. In these situations, the law has always protected us by trusting the judgment of our fellow citizens under an objective reasonableness standard. If these standards are good enough to protect the lives, liberties, and constitutional rights of all citizens in other emergencies, there is no reason abortion laws require different treatment. The legitimate concerns of both sides would be addressed by an opinion embracing this common-sense approach—and simultaneously holding that the Constitution *requires* that such justification laws must remain applicable to restrictions on abortion.

CONCLUSION

For these reasons, New Hampshire's efforts to protect the health and welfare of its pregnant minors should be upheld as constitutional.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF *AMICAE*

Ms. Maureen L. Curley, MS, APRN is an Advanced Practice Registered Nurse in Adult Psychiatric Nursing with licensure in Vermont and Massachusetts. As a psychiatric nurse practitioner for fifteen years, her practice includes clinical, teaching, and research specializing in women's mental health with a focus in psychological stress disorders after abortion. Currently, Ms. Curley is a PhD candidate at McGill University in Montreal, Canada where she is researching post abortion reactions among college students. She provided expert testimony in support of parental notification of abortion for minors before the Vermont State Legislature's Health and Welfare, as well as Judiciary Committees in 2001 and 2002. Her professional affiliations include membership with the American Psychiatric Nurses Association and Sigma Theta Tau National Honor Society of Nursing.

Ms. Lisa Alekna, M.Ed., LSWA had an abortion at the age of fifteen and is now a licensed clinical social worker. She experienced negative psychological consequences for years following her abortion. She attempted suicide three times, abused drugs and alcohol, and suffered from low self-esteem. As a member of a psychiatric crisis team, Ms. Alekna has personally interviewed dozens of women who were suicidal or suffered from Post-Traumatic Stress Disorder after an abortion. Many of these women regretted not telling their parents about their abortions. "When the teens do talk to their parents," Ms. Alekna states, "they are often surprised to find out how supportive their parents actually are." She thinks that "parental notification is essential to helping pregnant teens make the best possible choice."

Ms. Felicia Bautista had an abortion at the age of fifteen without notifying her parents. After her abortion, she experienced adverse physical and psychological consequences

that lead her to spend one and a half years in counseling. "The abortion clinic made it seem like an abortion was nothing," Ms. Bautista says, "but living with it on a day-to-day basis, it was something." She wishes that her parents had been notified. "My parents would have supported me. They would not necessarily have taken the option of abortion away from me, but they would have explained my options . . . . I'm all for parents knowing."

Ms. Susanna Brennan had an abortion at the age of sixteen without notifying her parents. She regrets that her parents did not know that she was contemplating an abortion. In hindsight, she says, "Had my parents known . . . I'm sure they would have helped me through the pregnancy." Ms. Brennan experienced negative psychological consequences in the years following her abortion. Although she had no prior history of depression or substance abuse, she suffered from depression and eating disorders, entertained suicidal thoughts, and abused alcohol. Ms. Brennan strongly supports parental notification because "a child has no idea what she is undertaking when she has an abortion . . . . They are left alone making the most important decision of their lives."

Ms. Patricia Kelly Clark had an abortion at the age of seventeen. "I wouldn't have been so alone," she says, "if my parents had known the truth." At the time, she was not aware of the potential negative physical and psychological consequences of abortion. She states, "I needed that information and didn't get it." Since her abortion, Ms. Clark has suffered from miscarriages, infertility, and an anxiety condition that requires psychiatric treatment. She believes that parental notification is "essential for the well-being of any girl contemplating abortion."

Ms. Brenda Cochran's daughter, **Ms. Felicia Bautista,** had an abortion without her knowledge. She says, "I found out about my daughter's abortion in the most horrible way, because my child was dying." After her abortion, Felicia developed urinary tract infections that grew progressively worse until her kidneys were failing. She has also had many

ovarian cysts since her abortion. As a result, her doctor believes that her chances of ever having children are very slim. "If there had been a parental notification law," Ms. Cochran states, "I would have informed her that she might not have kids afterwards - I already knew about that risk. I would have said, 'Together as a family we can make it.' My being her mother for fifteen years was stripped away from me. She had to have permission even to go tanning, but not for an abortion . . . . Something needs to be done to protect these girls. I am all for parental notification."

Ms. Carole LaFreniere had two abortions as a minor without notifying her parents. She wishes that her parents had known she was contemplating abortion. She believes that, "If they had known, they would have helped me because they loved me . . . and I could have avoided a lot of misery and pain." After her first abortion, Ms. LaFreniere became depressed and started to abuse drugs. Following her second abortion, she twice attempted to commit suicide. Ms. LaFreniere supports parental notification because she believes "teenagers don't have enough life experience to make a decision that will change their lives. They need guidance and if they still have the abortion and have problems coping, their parents can get them help."

Ms. Eileen Roberts' minor daughter had an abortion without her knowledge. She wishes that she had known that her daughter was considering an abortion. After her abortion, Ms. Roberts' daughter became so severely depressed that she had to be hospitalized. While she was in the hospital doctors discovered that her abortion was incomplete and further surgery was required. She later developed pelvic inflammatory disease as a result of the abortion. Ms. Roberts says, "If I had been notified that she was considering an abortion I could have put my arms around her, told her that I loved her and that we'd work this out as a family."

Ms. Maura Jane Rogers became pregnant at the age of seventeen but decided not to have an abortion. Because of her mother's guidance and support she was able to carry her

baby girl to term and give her up for adoption. Ms. Rogers says that her mother stood by her: "She fought to get me into a school system that didn't want me and fought to get me proper health care when the hospital didn't want me."

Ms. Eve Sanchez Silver had an abortion at the age of sixteen without notifying her parents. She has also worked as the director of a center that assists women facing crisis pregnancies. Ms. Silver regrets that she did not tell her parents about her abortion. She indicates, "I did not have the benefit of their guidance concerning my decision to abort." She particularly wishes her parents had known so that they could have told her about her family medical history, which included early miscarriages, bleeding disorders, aneurysms and breast cancer. Since her abortion, Ms. Silver has had two episodes of breast cancer and eleven late-term miscarriages. In her work counseling pregnant women, she encountered young women who chose not to have abortions after they learned about their family medical histories from their parents. She also met young women who decided to give birth because of the positive support they received from their families.

Ms. Kim Macri became pregnant at the age of sixteen after being raped. She had an abortion without notifying her parents. She says that at the time "she didn't think she could go to her parents," but now she "regrets her abortion." In the years following her abortion, Ms. Macri experienced negative physical and psychological consequences. She abused alcohol, suffered from low self-esteem and had multiple miscarriages. When she finally became pregnant she says, "I thought that I didn't deserve to be a mother."

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IN THE

Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the First Circuit apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the *undue burden standard* cited in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) applied rather than the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?

2. Whether the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2003), preserves the health and life of the minor through the Act's judicial bypass mechanism and/or other state statutes.

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Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992)	*passim*
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N. Abdullaev, "Russians are quickest to marry and divorce," *Moscow Times* (Dec 8, 2004)	16
V. Beral, D. Bull, R. Doll, R. Peto, G. Reeves, "Breast cancer and abortion: collaborative reanalysis of data from 53 epidemiological studies, including 83,000 women with breast cancer from 16 countries," 363 *Lancet* 1007 (2004)	15
Information packet, Women's Environment and Development Organization (WEDO) World Conference on Breast Cancer (July 1997)	16
A. Khan, "The role of fat in breast cancer," *The Independent* (May 18, 1998)	16
Karen Malec, "The Abortion-Breast Cancer Link: How Politics Trumped Science and Informed Consent," 8 J. Am. Physicians & Surgeons 41 (Summer 2003), http://www.jpands.org/vol8no2/malec.pdf	14
Angela Lanfranchi, M.D., F.A.C.S., Statement to the Press at the Population Research Institute Conference, Santa Clara, California (April 5, 2002), http://www.aapsonline.org/lanfranchi.htm	3
March of Dimes, *Complications of Premature Birth*, http://www.marchofdimes.com/prematurity/5512.asp	17

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K. O'Flaherty, R. Oakley, "Self-checks 'useless' in breast cancer fight," *Sunday Tribune* (Ireland), (Oct. 6, 2002)..... 16

R. O'Reilly, "New weapon in war against breast cancer," *The Press Association Ltd.* (Dec. 17, 1998)..... 16

"Probability of breast cancer in American Women," National Cancer Institute (Apr. 15, 2005) http://cis.nci.nih.gov/fact/5_6.htm 15

D.C. Reardon, P.G. Ney, F.J. Scheuren, J.R. Cougle, P.K. Coleman, T. Strahan, "Deaths associated with pregnancy outcome: a record linkage study of low income women," 95 Southern Medical Journal 8 (August 2002)..... 14

Brent Rooney and Byron C. Calhoun, "Induced Abortion and Risk of Later Premature Births," 8 J. Am. Physicians & Surgeons 46 (Summer 2003) http://www.jpands.org/vol8no2/rooney.pdf..... 17

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"With BC-Portugal abortion referendum," *Associated Press Worldstream* (June 27, 1998)..... 16

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BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. Eagle Forum ELDF is a pro-family group that has long advocated judicial restraint and fidelity to the text of the U.S. Constitution. In the abortion context, Eagle Forum ELDF opposes overreaching by federal courts in reviewing

[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

laws passed by state legislatures that provide for parental and informed consent in connection with abortion. Eagle Forum ELDF has a strong interest in ensuring adherence by federal courts to their limited role set forth in the Constitution, and submits this brief in support of limiting federal judicial review of state abortion statutes to the standard promulgated by this Court in reviewing other regulations of conduct.

SUMMARY OF ARGUMENT

It is axiomatic that federal jurisdiction is limited to actual cases and controversies, as set forth in Article III of the U.S. Constitution. Federal courts are not mini-legislatures, empowered to exercise veto power over statutes duly enacted by Congress or state legislatures. This Court articulated the widely followed standard for federal judicial review of legislation: a facial challenge can succeed only if there are no circumstances in which the legislation may be applied constitutionally. *United States v. Salerno*, 481 U.S. 739, 745 (1987). That precedent represents an essential expression of limits on judicial power with respect to legislation. Courts are tribunals for adjudicating facts, not second-guessing legislation in a factual vacuum.

The existence of a large and politically powerful abortion industry in our Nation does not justify contradicting *Salerno*. Quite the contrary, abortion presents a compelling need to develop a factual record of application of a statute prior to passing judgment on it in a court. Judges are skilled in law but lack medical training, and they are particularly unsuited to sift medical fact from fiction in the absence of an actual implementation of a parental notification law. If the effects of the New Hampshire legislation are as dreadful as Respondents claim, then they would have no trouble presenting a court with an unconstitutional implementation to litigate their claims.

The court below erred in ignoring the harmful health effects of abortion, and therefore the need to notify parents of unemancipated minors prior to performing it. Growing recognition of the tragic causation by abortion of breast cancer and premature births reinforces the legitimacy of state laws requiring parental or informed consent for minors having abortion. Just as the deadly harms of smoking were kept quiet for decades, the fatal physical effects of abortion are rarely disclosed to the subjects of an abortion. States have a substantial interest, even a compelling one, to ensure that minors considering an abortion hear from mature voices other than the abortionists who stand to profit from the procedure. If health of the minor were the real concern, then all would favor parental notification so that the family health history of the patient may be fully considered. If the mother of the minor herself had breast cancer—a fact of which the minor might not be aware—then performing the abortion could increase the daughter's chance of breast cancer to a near certainty. "At best, [a teenager's abortion] will give her a 30% risk of breast cancer in her lifetime. At worst, if she also has a family history of breast cancer, it will nearly guarantee this." So observed breast surgeon Angela Lanfranchi, M.D., F.A.C.S., in her statement to the press at the Population Research Institute Conference, in Santa Clara, California (April 5, 2002).[2] Moreover, if the minor is considering having a family in her future—again a consideration best discussed with her parents—then having an abortion greatly increases the chance of a debilitating premature birth and attendant injuries such as cerebral palsy. *See* Point III, *infra*.

The New Hampshire statute at issue can plainly be applied in a constitutional manner for the valid and commendable purpose of allowing minors to be fully informed with the wisdom of their parents, including medical considerations,

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[2] http://www.aapsonline.org/lanfranchi.htm (viewed Aug. 2, 2005).

prior to agreeing to have the life-changing operation of abortion. It is legally and medically unsound for federal courts to violate the *Salerno* standard and strike down legislation in a factual darkness.

ARGUMENT

I. THE U.S. CONSTITUTION AND *SALERNO* REQUIRE REVERSAL OF THE FACIAL INVALIDATION OF THE NEW HAMPSHIRE ABORTION STATUTE.

The facial invalidation of statutes permitting constitutional implementation violates the "case or controversy" requirement for adjudication. U.S. CONST. Art. III, § 2. "[U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark v. Wickard*, 321 U.S. 288, 310 (1944). To hold otherwise "would enable the courts . . . 'to assume a position of authority over the governmental acts of another and co-equal department.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (quoting *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

The federal judiciary does not sit as a supra-legislature over the actions of the States. A plaintiff such as Respondent Planned Parenthood of Northern New England cannot base its litigation on pure speculation that someone might someday suffer an unconstitutional injury due to a statute that has never been enforced. Courts are not venues for Platonic discussions about what might or might not occur. An actual case or controversy is required to establish Article III jurisdiction, and there is no exception carved out of Article III especially for abortion providers. *Salerno* requires implementation of the statute, regardless of whether a right is asserted under *Roe v. Wade*, 410 U.S. 113 (1973).

In *Salerno*, this Court upheld the Bail Reform Act because "[t]he fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Salerno*, 481 U.S. at 745. Under this standard, the never-enforced New Hampshire parental notification law must be upheld. There is no evidence that it would be applied in an unconstitutional manner, and it has an obvious justification in safeguarding minors. The pure speculation offered for how the statute might be applied unconstitutionally is conjecture and nothing more.

Despite the clear holding of *Salerno*, none of the plurality opinions in *Casey* so much as acknowledged its existence, perhaps reflecting an unwillingness to depart from *Salerno*. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (not one of the five Justices affirming *Roe v. Wade* even mentioning the *Salerno* test, despite its reference by the four Justices who agreed *Roe* should be overruled). Previous to *Casey*, this Court repeatedly cited *Salerno* in abortion cases. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring). The *Salerno* test has since been widely and successfully applied elsewhere, even by the same appellate court below in denying a facial challenge to restrictions on sidewalk counselors advising against abortion. *See McGuire v. Reilly*, 386 F.3d 45, 57 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 1827 (2005). Only in the field of abortion law, and only in favor of abortion, does this Court use the "undue burden" test outside of the First Amendment context. This unexplained deviation by *Casey* is unjustified and should be overturned.

The practice of abortion is a far cry from the right of free speech that is essential to self-government, and thus de-

serving of an "undue burden" standard. In *Schneider v. New Jersey* 308 U.S. 147 (1939), this Court held that "the freedom of speech and that of the press [are] fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." *Id.* at 161. Because of this fundamental importance to the functioning of a democratic society, First Amendment challenges to laws are judged under an "undue burden" standard to prevent an atmosphere of self-censorship caused by overly broad statutes. According to this Court, allowing a litigant to utilize this standard "is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

In sharp contrast, abortion is not a right of expression, nor is it fundamental to the functioning of a free government under the *Schneider* interpretation. No one, regardless of his position on abortion, can regard it as fundamental to the successful functioning of a democracy. The fact that this Court has not extended the "undue burden" standard to cases involving the important rights of the Fifth and Eighth Amendments (to use the issue in *Salerno* as an example) supports this view of the First Amendment's unique position.

This Court should end the conflict between the *Salerno* and *Casey* decisions in favor of the *Salerno* holding. The Fourth and Fifth Circuits have properly continued to apply *Salerno*, as it has not been overturned. In *Barnes v. Moore,* the Fifth Circuit upheld the use of *Salerno* on precedential grounds: "we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes." 970 F.2d 12, 14 n.2 (5th Cir.), *cert. denied*, 506 U.S. 1013 (1992). The Fourth

Circuit held likewise. "We begin by emphasizing... that the challenge to [the abortion clinic regulation] is a facial one and therefore 'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act 'would be valid.'" *Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health & Envtl. Control*, 317 F.3d 357, 362 (4th Cir. 2002), *cert. denied,* 538 U.S. 1008 (2003) (quoting *Salerno*, 481 U.S. at 745). *See also Okpalobi v. Foster*, 244 F.3d 405, 427 n.35 (5th Cir. 2001); *Manning v. Hunt*, 119 F.3d 254, 268-69 (4th Cir. 1997). It is therefore essential that this Court end the confusion by clearly, definitively, and explicitly upholding the *Salerno* test over the *Casey* contradiction.

The other part of the *Casey* test, the "large fraction" standard, should similarly be rejected due to its overly subjective nature. 505 U.S. at 895 (plurality decision). It is noteworthy that, although only a tiny percentage of minors have severe health problems, many federal courts invariably find that the *Casey* threshold had been crossed to trigger the "undue burden" test based on such rarely occurring and speculative illnesses. Proponents of judicial interference with state regulations of abortion fail to cite definite health risks of abortion beyond a vague and unsubstantiated comparison of risk between abortion and childbirth. Courts are left in the dark about the many grave, long-term health dangers associated with abortion. *See* Point III, *infra*. The lack of real evidence showing a health need for abortion renders lower courts' finding of a "large fraction" absurd.

Moreover, the arbitrary "large fraction" test is unprincipled. Is 1% of a particular group a constitutionally acceptable fraction, but 10% unconstitutional? Such hair-splitting is best left out of the Judiciary's purview. Either a law is repugnant on its face to the Constitution, or it is presumptively constitutional until applied in an unconstitutional manner. Because the "undue burden" test is misapplied

outside the First Amendment context, and the "large fraction" test is vague and subjective, the Court should clarify that the *Salerno* standard of constitutionality applies to the business of abortion just as it applies to every other type of commercial conduct. *See Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 1006 (2004) (Roberts, J., dissenting) (noting that "a facial challenge can succeed only if there are no circumstances in which the Act at issue can be applied without violating the" Constitution).

II. JUDICIAL RESTRAINT IS PARTICULARLY APPROPRIATE IN REVIEWING LEGISLATION ENSURING PARENTAL NOTIFICATION FOR MEDICAL PROCEDURES.

"Courts are ill-equipped to evaluate the relative worth of particular surgical procedures," Justice Kennedy has observed. *Carhart v. Stenberg*, 530 U.S. 914, 968 (2000) (Kennedy, J., dissenting). The reasoning behind that statement is beyond dispute. "The legislatures of the several States have superior factfinding capabilities in this regard." *Id.* Justice Kennedy noted that this "general rule extends to abortion cases," quoting Justice O'Connor for the proposition that "the Court is not suited to be 'the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.'" *Id.* (quoting *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting, internal quotation marks omitted)).

The need for judicial restraint in favor of legislatures is even more compelling when the issue concerns parental notification so that minors can give mature and informed consent to a procedure. A minor is often in no position to know her family's medical history and how an abortion may increase her chance for serious medical problems, as

discussed in Point III, *infra*. A court is ill-equipped to decide what type of notification and consent is appropriate for a minor considering to undergo a life-threatening operation. "'Irrespective of the difficulty of the task, legislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts.'" *Carhart*, 530 U.S. at 968 (Kennedy, J., dissenting, quoting *City of Akron*, 462 U.S. at 456, n. 4).

Federal courts are not family courts, and are even less experienced in the advantages and disadvantages of medical operations for a member of one's family. Where "it is difficult to conceive of an area of governmental activity in which the courts have less competence," this Court has emphasized the need for deference and judicial restraint. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (deferring to military). As little as the experience of federal courts is in military matters, it is markedly less in family or medical issues. Federal judges do often have personal experience in the military, but almost none has any medical training or experience with parental notification requirements.

In contrast, legislatures often include many experienced physicians (the Majority Leader of the U.S. Senate is a surgeon), and, more importantly, the legislative process can benefit from a wide range of medical input and related factfinding along with full participation by the public. In sharp contrast, judicial proceedings are confined to a few handpicked "experts" paid for their time in delivering an expected opinion. There is little public scrutiny of what they say and deliberation is limited to a single person untrained in medicine rather than a group of legislators who can draw upon medically experienced staffs and constituents. If courts are poor venues for deciding military issues, then they are even less suited to invalidate statutory consent requirements for minors concerning a controversial procedure. The highest level of judicial restraint is warranted here.

Judicial invalidation by a court of an abortion law "on its face," without even development of a factual record for implementation of the statute, is particularly unwarranted. Courts, already unsuited for rendering legislative decisions, are less equipped for deciding medical notification requirements in the absence of a factual record of implementation.

In *Carhart*, one federal court struck down a law used by 31 states without benefiting from a factual record of any implementation of any of the statutes:

> The United States District Court in this case leaped to prevent the law from being enforced, granting an injunction before it was applied or interpreted by Nebraska. In so doing, the court excluded from the abortion debate not just the Nebraska legislative branch but the State's executive and judiciary as well. The law was enjoined before the chief law enforcement officer of the State, its Attorney General, had any opportunity to interpret it. The federal court then ignored the representations made by that officer during this litigation. In like manner, Nebraska's courts will be given no opportunity to define the contours of the law, although by all indications those courts would give the statute a more narrow construction than the one so eagerly adopted by the Court today. Thus the court denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute. This cannot be what *Casey* meant when it said we would be more solicitous of state attempts to vindicate interests related to abortion. *Casey* did not assume this state of affairs.

530 U.S. at 978-79 (Kennedy, J., dissenting) (citations omitted). Justice Kennedy observed that even in the facial challenge that invalidated the law, "no expert called by Dr. Carhart, and no expert testifying in favor of the procedure, had in fact performed a partial-birth abortion in his or her medical practice." *Id.* at 966.

Legislation concerning parental notification for medical procedures is an area where judicial competence is at its nadir. Were a medical researcher to prove tomorrow that having abortion shortens a woman's lifespan, legislatures could immediately hear and act on such information to ensure properly informed consent by minors considering such an operation. Courts, however, could not. It would be years, perhaps decades, before courts could assess the revelation and translate it into a meaningful right to informed consent; when a court couches its ruling in the authority of the Constitution, then it may take several generations to correct the error.

The reasons cited by the appellate court below in invalidating a state law on its face were entirely speculative and inadequate. The appellate court decision is devoid of any meaningful discussion of the alleged health conditions that would require an abortion not allowed by the statute. It merely cites a general and unsubstantiated claim of Dr. Wayne Goldner, who listed five conditions he claimed could require abortion to protect a minor's health: preeclampsia, eclampsia, premature rupture of the membranes surrounding the fetus, spontaneous chorioamnionitis, and heavy bleeding during pregnancy. Yet there is no comparison of abortion to other medical procedures that could address these illnesses, including childbirth. There is no explanation of why a minor having such serious illnesses would not be admitted to a hospital rather than operated on by an abortion clinic. The court below did not explain why a delay of a few days for notification would supposedly be detrimental to these conditions. Such unsupported medical determinations by a court is not a proper administration of the judicial function.

"Unsubstantiated and generalized health differences which are, at best, marginal, do not amount to a substantial obstacle to the abortion right." *Carhart v. Stenberg*, 530 U.S. at 967-68 (Kennedy, J., dissenting) (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 874, 876 (1992) (joint opinion of

O'Connor, Kennedy, and Souter, JJ.)). Likewise, the "unsubstantiated and generalized" claims of undue burden here do not justify invalidation of the New Hampshire statute. The decision below must be reversed.

III. The Court Below Erred in Ignoring the Harmful Effects of Abortion, and how Parental Notification Can Provide a Minor with a Means to Learn about the Potentially Adverse Health Effects of the Procedure.

The abortion industry, like the tobacco industry, is not likely to tell the public or its customers about the harm that its product and services cause. That responsibility properly falls upon the legislature in mandating the disclosure of information and, in the case of minors, notification of parents or outright prohibition. Yet lower courts, including the appellate court here, continue to pretend that abortion causes no adverse health effects. The State of New Hampshire could rationally conclude that parents are more likely to tell their child the truth, and parental notification should be upheld on that basis. A government that can ban the sale of cigarettes to minors can surely require parental notification prior to performing an abortion on a minor.

The court below turned the issue of the health of minors on its head by implying that there are only *positive* health benefits in an abortion, and demanding a health exception on that basis, while ignoring undeniably *negative* effects of abortion. The decision also ignores, in a way that no legislature would, the obvious conflict-of-interest in allowing an abortion provider alone to talk a minor into having an abortion. New Hampshire can plainly require that a minor have access to information from her parents prior to allowing performance of the procedure. To the extent the majority opinion in *Carhart* requires a general health exception to be exercised in the sole discretion of an abortion provider profiting from the operation, *Carhart* should be flatly overruled.

Justice Kennedy decried in *Carhart* how:

> the Court awards each physician a veto power over the State's judgment that the procedures should not be performed. . . . Requiring Nebraska to defer to [one physician's] judgment is no different than forbidding Nebraska from enacting a ban at all; for it is now [the physician] who sets abortion policy for the State of Nebraska, not the legislature or the people. *Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure.

Carhart at 964-65.

The court below committed the same error, implying that a an abortionist alone be allowed to authorize an abortion for a minor, when the abortionist has a vested financial interest in performing the abortion in question. *Planned Parenthood v. Heed*, 390 F.3d 53, 59-62 (1st Cir. 2004). Such health exception defeats and cripples the statute by providing an interested party with the authority to override the State. Because "health" can be interpreted to cover almost any physical or mental condition, an abortionist can remain within the letter of the law by declaring a health need for his operation at whim.

As Judge Edith Jones wrote in reviewing a legal attempt by the original "Roe" in *Roe v. Wade* to overturn that precedent, "[h]ard and social science will of course progress even though the Supreme Court averts its eyes." *McCorvey v. Hill*, 385 F.3d 846, 852-53 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 1387 (2005) (Jones, J, concurring). Judge Jones continued:

> One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* accordingly. That the Court's constitutional

> decision making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the abortion decisions, but about a number of other areas in which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication."

Id. at 853.

The court below erred in denying well-researched and reported harmful effects that abortion has for many of its subjects. Women who have a family history of breast cancer or other illnesses may be giving themselves the medical equivalent of a death sentence by agreeing to undergo an abortion. The medical literature is filled with peer-reviewed studies demonstrating how harmful abortion is to one's health. *See generally* J.M. Thorp, Jr., K.E. Hartmann, and E.M. Shadigian, "Long-Term Physical & Psychological Health Consequences of Induced Abortion: Review of the Evidence," 58 OB/GYN Survey 1, at 67-79 (2003); D.C. Reardon, P.G. Ney, F.J. Scheuren, J.R. Cougle, P.K. Coleman, T. Strahan, "Deaths associated with pregnancy outcome: a record linkage study of low income women," 95 Southern Medical Journal 8, at 834-41 (August 2002) ("Higher death rates associated with abortion persist over time and across socioeconomic boundaries."); Karen Malec, "The Abortion-Breast Cancer Link: How Politics Trumped Science and Informed Consent," 8 J. Am. Physicians & Surgeons 41 (Summer 2003) (the vast majority of studies have found that abortion increases the risk of breast cancer).[3] Even abortion supporters must concede that childbirth has a protective health effect lost to women who undergo abortion, and parents are more likely to provide that information to their child than an abortionist is.

[3] http://www.jpands.org/vol8no2/malec.pdf (viewed Aug. 3, 2005).

Abortion providers predictably deny adverse health effects of abortion, despite medical research demonstrating how harmful it is. Illustrative of the denial was a much-publicized article in March 2004 in the British medical journal *The Lancet*, which concluded that "[p]regnancies that end as a spontaneous or induced abortion do not increase woman's risk of developing breast cancer." V. Beral, D. Bull, R. Doll, R. Peto, G. Reeves, "Breast cancer and abortion: collaborative reanalysis of data from 53 epidemiological studies, including 83,000 women with breast cancer from 16 countries," 363 *Lancet* 1007, 1007 (2004). Aside from criticized flaws in that survey, it did not even confront the health effect of the abortion itself. Instead, it compared [pregnancy followed by abortion] to [no pregnancy at all]. The *Lancet* article could not and did not deny that abortion increases breast cancer; instead, it merely claimed that pregnancies ending in abortion do not, taken together, increase overall breast cancer risk. But a pregnant minor needs to evaluate the effect of the abortion, not a hypothetical absence of a pregnancy in the first place. If the abortionists—or Respondents in this case—cite the *Lancet* conclusion then a judge could be easily misled, and a minor surely would be. But a parent is not so easily fooled in matters concerning her child, and legislatures can lawfully promote informed consent by requiring parental notification.

A parent might observe and restate, for example, how breast cancer rates are far lower in Western countries that prohibit abortion than those that promote it. Ireland, which virtually bans abortion, has a lifetime rate of breast cancer of only 1 in 13, nearly half the rate of 1 in 7.5 in the United States. *See* "Probability of breast cancer in American Women," National Cancer Institute (Apr. 15, 2005)[4];

[4] http://cis.nci.nih.gov/fact/5_6.htm (viewed Aug. 3, 2005).

K. O'Flaherty, R. Oakley, "Self-checks 'useless' in breast cancer fight." *Sunday Tribune* (Ireland), at 8 (Oct. 6, 2002).

In Romania, under two decades of rule by the dictator Nicolae Ceausescu, abortion was illegal and the country enjoyed one of the lowest breast cancer rates in the entire world during that time, far lower than comparable Western countries. Romania's breast cancer rate was an astounding one-sixth the rate of the United States. *See* A. Khan, "The role of fat in breast cancer," *The Independent* (May 18, 1998). But after the execution of Ceausescu on Christmas Day, 1989, Romania has taken the entirely opposite approach, embracing abortion to the point that Romania now has one of the highest abortion rates in the world. *See* N. Abdullaev, "Russians are quickest to marry and divorce," *Moscow Times* (Dec 8, 2004). One Romanian observer decried, "The liberalization of abortions in Romania in 1990, the significant increase of the number of abortions at relatively short intervals, determined a raise in the incidence of breast and uterine cervix cancer in my country." Information packet, Women's Environment and Development Organization (WEDO) World Conference on Breast Cancer (July 1997).

While there are inherent differences in breast cancer rates across ethnic populations, regions with similar ethnicity show dramatic differences in breast cancer that correlate highly to relative abortion rates. For example, the rate of breast cancer increases steadily as one travels from Ireland, where abortion is illegal, to Northern Ireland, where abortion is legal but rare, to England, where abortion is common. *See* R. O'Reilly, "New weapon in war against breast cancer," *The Press Association Limited* (Dec. 17, 1998); "With BC-Portugal abortion referendum," *Associated Press Worldstream* (June 27, 1998).

A parent might also recount how future-born children of a minor who has an abortion could suffer severe harm, and many minors might eschew abortion for that reason. "At least 49 studies have demonstrated a statistically significant

increase in premature births (PB) or low birth weight (LBW) risk in women with prior induced abortions (IAs)." Brent Rooney and Byron C. Calhoun, "Induced Abortion and Risk of Later Premature Births," 8 J. Am. Physicians & Surgeons 46 (Summer 2003).[5] Premature birth tragically causes brain damage, and an array of other severe, lifelong injuries ranging from cerebral palsy to blindness to the victim infants, and few mothers would knowingly increase the risk of that happening.[6] Researchers Rooney and Calhoun observed:

> Large studies have reported a doubling of EPB risk from two prior IAs. Women who had four or more IAs experienced, on average, nine times the risk of XPB, an increase of 800 percent. These results suggest that women contemplating IA should be informed of this potential risk to subsequent pregnancies, and that physicians should be aware of the potential liability and possible need for intensified prenatal care.

Id.

It is ironic and illogical for the court below to invalidate the New Hampshire law in the name of health, when such action will relegate many uninformed minors to a life of fear and often death caused by the effects of those abortions. It was entirely rational and constitutional for New Hampshire to give the parents of the minors information that they could act upon to persuade their own child not to have the abortion. Patients, not physicians, make the ultimate decision whether to agree to an operation or treatment, and parental notification can only increase the information for the minor to make that decision.

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[5] http://www.jpands.org/vol8no2/rooney.pdf (viewed Aug. 3, 2005).

[6] March of Dimes, *Complications of Premature Birth*, at http://www.marchofdimes.com/prematurity/5512.asp (viewed Aug. 3, 2005).

No matter how bad the health of an unemancipated minor is, or how advantageous an abortion provider may claim an abortion to be, the decision of whether to have that abortion still resides with the patient rather than the physician. The legislature can surely require that the minor's decision be fully informed, and enhance that information by requiring notification of a parent. Only then is a minor likely to hear both sides of the arguments concerning abortion, and abortionists fight such notification for the same reason that justifies giving it: many minors decide against having an abortion once they hear from their parents. Not even the wisest judge in the world can make an optimal decision based on hearing only one side to a story, and New Hampshire can ensure that unemancipated minors hear both sides of the abortion debate before electing to have one. The health of the minor, or alleged health benefits of an abortion, do not change this analysis.

The judiciary need not attempt to make a scientific determination about the adverse health effects of abortion. But this Court should clarify that the health effects of an operation are for the patient alone to decide, based on full information from whatever sources the legislature mandate. In the case of an unemancipated minor, it is eminently rational for a legislature to facilitate parental advice for the benefit of a child prior to making this decision that could alter or even end her life. To the extent that the court below was concerned with the health of the minors, that is all the more reason to respect the legislature's determination that parental notification is an essential part of the minor's informed consent to the procedure. Short of death, which is exempted from the statute, any alleged positive health effect of an abortion may be deemed by the minor and her parent to be offset by negative health effects of the abortion. The State of New Hampshire need not rely on the abortion provider to supply all the negative health effects of an abortion, any more than the public must rely on tobacco companies to inform us

of all the harm caused by cigarettes. New Hampshire's legislation is a constitutional attempt to facilitate informed consent by a minor, and should be upheld.

CONCLUSION

This Court should reverse the decision below and affirm application of the *Salerno* precedent to abortion laws. Legislative requirements of parental consent for a minor seeking an abortion are a legitimate method of protecting the welfare of the minor, and that the above reasons require that the New Hampshire statute be upheld.

Respectfully submitted,

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KELLY A. AYOTTE, Attorney General
of the State of New Hampshire
in her official capacity,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL, INC. AND FOCUS ON THE FAMILY IN SUPPORT OF THE PETITIONER

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Bellotti v. Baird, 443 U.S. 622 (1979) 18

Eddings v. Oklahoma, 455 U.S. 104 (1982) 18

Hodgson v. Minnesota, 497 U.S. 417 (1990) ..... *passim*

Johnson v. Texas, 509 U.S. 350 (1993) 18

Planned Parenthood v. Heed, 390 F.3d 53 (1st Cir. 2004) ..... *passim*

Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908 (9th Cir. 2004) 4, 6

Planned Parenthood of the Rocky Mountain Services, Corp. v. Owens, 287 F.3d 910 (10th Cir. 2002) 4

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 803 (1992) ..... *passim*

Roe v. Wade, 410 U.S. 113 (1973) 5, 6, 11, 12

Roper v. Simmons, 543 U.S. ___ (2005) 18

Stenberg v. Carhart, 530 U.S. 914 (2000) 4, 5

STATUTES:

N.H. REV. STAT. ANN. § 132:25 (2003) 20

N.H. REV. STAT. ANN. § 153-A:18 (2003) 24

N.H. REV. STAT. ANN. § 169-C:3(XIV) (2003) 27

N.H. REV. STAT. ANN. § 169-C:3(XIV)(a)(3) (2003) 28

N.H. REV. STAT. ANN. § 170-B:5(I)(a) (2003) 28

N.H. REV. STAT. ANN. § 632-A:3(II) (2003) 28

TABLE OF AUTHORITIES – Continued

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OTHER AUTHORITIES:

ALAN GUTTMACHER INST., U.S. TEENAGE PREGNANCY STATISTICS: OVERALL TRENDS, TRENDS BY RACE AND ETHNICITY, AND STATE-BY-STATE INFORMATION 12 (2004) 14

Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN.. PERS. 169 (1988) 25

Ariz. Dep't of Health Serv., Characteristics of Women Receiving Abortions, 1993-2003, tbl. 1D-1, *at* http://www.azdhs.gov/plan/report/ahs/ahs2003/xls/t1d1.xls 25

B. Bradford Brown, *Peer Groups and Peer Cultures, in* AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 171 (S. Shirley Feldman & Glen R. Elliot eds., 1990) 19

Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 APPLIED DEV. PSYCH. 257 (2001) 18, 19

C.D. Martin, *Psychological Problems of Abortion for Unwed Teenage Girls*, 88 GENETIC PSYCHOL. MONOGRAPHS 23 (1973) 16

CTR. FOR DISEASE CONTROL AND PREVENTION, REPORTED LEGAL ABORTIONS OBTAINED BY ADOLESCENTS BY KNOWN AGE AND STATE OF OCCURRENCE – SELECTED STATES, UNITED STATES (1995) 14

TABLE OF AUTHORITIES – Continued

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CTR. FOR DISEASE CONTROL AND PREVENTION, ABORTION SURVEILLANCE – UNITED STATES, 2000 (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5212a1.htm (last visited July 11, 2005) 25

CTR. FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS REPORT, 2000 (2002) 26

CTR. FOR LABOR MKT. STUDIES, NORTHEASTERN UNIVERSITY, THE SUMMER JOB MARKET FOR U.S. TEENS 2000-2003 AND THE PROJECTED OUTLOOK FOR THE SUMMER OF 2004 (2004) 14

Daniel de Vise, *Bill Would Legislate Maryland Students' Use of Sunscreen*, WASH. POST., Mar. 29, 2005 16

Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000) 18

FLA. DEP'T OF HEALTH, FLORIDA VITAL STATISTICS ANNUAL REPORT, 2003 (2003), *available at* http://www.doh.state.fl.us/Planning_eval/vital_statistics/03Vitals/termination.pdf (last visited July 11, 2005) 26

H.M. Babikian & A. Goldman, *A Study in Teen-Age Pregnancy*, 128 AM. J. PSYCHIATRY 755 (1971) 16

H.R. REP. NO. 109-051 (2005) 17

J.S. Wallerstein et al., *Psychological Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 ARCHIVES GEN. PSYCHIATRY 828 (1972) 16

TABLE OF AUTHORITIES – Continued

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Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEV. REV. 1 (1991) 19

Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339 (1992) 19

Jennifer Manlove, *The Influence of High School Dropout and School Disengagement on the Risk of School-Age Pregnancy*, 8 J. RES. ADOLESCENCE 187 (1998) 14

Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescent Decision Making*, 20 L. & HUM. BEHAV. 249 (1996) 19

Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1 (1992) 19

N.B. Campbell et al., *Abortion in Adolescence*, 23 ADOLESCENCE 813 (1988) 16

N.E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 AM. PSYCHOLOGIST 1194 (1992) 16

Nat'l Abortion and Reprod. Rights Action League, Young Women: Reproductive Rights Issues, *at* http://www.naral.org/Issues/youngwomen/index.cfm (last visited June 23, 2005) 20

Planned Parenthood Fed'n of Am., Inc., Fact Sheets: Teenagers, Abortion, and Government Intrusion Laws, *at* http://www.plannedparenthood.org/library/ABORTION/laws.html (last visited June 23, 2005) 19

Tamera M. Young et al., *Internal Poverty and Teen Pregnancy*, 36 ADOLESCENCE 289 (2001) 15

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U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN (2001) 14

U.S. CENSUS BUREAU, NEW HAMPSHIRE QUICKFACTS (2000), *available at* http://quickfacts.census.gov/qfd/states/33000.html 14

U.S. CENSUS BUREAU, WHAT'S IT WORTH? FIELD OF TRAINING AND ECONOMIC STATUS (2001) 15

U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON YOUTH CURFEWS IN AMERICA'S CITIES: A 347-CITY SURVEY (1997) 18

W. Franz & D. Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 ADOLESCENCE 161 (1992) 16

WILLIAM D. VALENTE, 2 EDUCATION LAW: PUBLIC AND PRIVATE (1985) 16

INTEREST OF THE AMICUS CURIAE[1]

Family Research Council, Inc. [hereinafter "FRC"] is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

FRCs legal and public policy experts are continually sought out by federal and state legislators for assistance and advice. FRC has participated in numerous amicus curiae briefs in the United States Supreme Court, lower federal courts, and state courts.

FRC represents thousands of constituents in its efforts to protect the institutions of marriage and family in federal and state law. Toward that end, FRC has worked to strengthen the legal definition of marriage as being a union of one man and one woman, as it always has been in the United States. FRC has conducted extensive research and produced numerous publications regarding the traditions of legal, cultural, moral, and religious support for marriage, as well as regarding the tangible benefits of traditional marriage for individuals and society.

Focus on the Family [hereinafter "FOF"] is a non-profit communications and educational organization dedicated to the preservation of marriage, parenting, and

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

the nurturing home. FOF produced a number of national and international radio broadcasts on family and cultural issues, publishes a number of magazines for family members of various ages and stages and a wider range of books as well as a website: www.family.org. Millions of families in America and abroad rely on FOF for help in understanding the dynamics of their own family as well as what is happening with the family culturally and how they help strengthen both.

SUMMARY OF THE ARGUMENT

The First Circuit's decision striking down New Hampshire's parental notice law rested on reasoning by parity: *if* a "health" exception is required for adults, *then* it is for minor girls, too. But no law requires adult women to consult their parents about an abortion. Only minors are so encumbered, and *precisely* for reasons – youth, immaturity, lack of life experience, financial and emotional dependence – which, this Court has often said, conclusively distinguish them from adults.

The question about parental involvement laws therefore has to be answered from the ground up. The First Circuit never examined, however, the policies, interests, and empirical data which this Court's precedents (*Hodgson*[2] and *Casey*[3] among them) examined in sustaining parental involvement laws. (The lower court ignored *Hodgson* in an even more important way: the statute

[2] Hodgson v. Minnesota, 497 U.S. 417 (1990).

[3] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 803 (1992).

upheld there is indistinguishable from the New Hampshire statute at issue in this case). If the lower court had considered all the pertinent interests – and if the court had considered how the law treats minors across the range of important life decisions – it would have seen what this Brief shows: New Hampshire's parental notice law fits comfortably within constitutional bounds.

ARGUMENT

I. The First Circuit's Opinion Relied Upon Mistaken Understandings of *Casey* and *Stenberg*, and Upon False Comparisons to Statutes Involving Adult Women, Not Minor Girls.

The First Circuit struck down New Hampshire's parental notification law because its "death" exception was inadequate and because it had no "health" exception at all. The challenged "death" exception is indistinguishable, however, from those upheld by this Court in *Hodgson v. Minnesota*[4] and *Planned Parenthood v. Casey*.[5] Nothing in this Court's most recent cases suggests that a broader exception should now be required. This part of the First Circuit decision should be reversed on the basis of settled authority.

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[4] 497 U.S. at 426 (quoting the exception as "necessary to prevent the woman's death").

[5] 505 U.S. at 902 (quoting the exception in the statute as "necess[ary] ... to avert her death"). The First Circuit faced identical language in the New Hampshire statute, the pertinent part of which stated "necessary to prevent the minor's death." Planned Parenthood v. Heed, 390 F.3d 53, 62 (1st Cir. 2004).

Hodgson also upheld a parental notice law which, like New Hampshire's, had no "health" exception. The First Circuit disregarded this part of *Hodgson*, too, saying that it was unconsidered. The court dismissed other cases upholding statutes like the New Hampshire statute, saying that they were "distinguishable." *Heed*, 390 F.3d at 60. The First Circuit chose instead to follow two federal circuit court decisions requiring a "health" exception to parental involvement laws.[6] More than that: the First Circuit held that the Constitution requires a "health" exception *per se*: any "statute regulating abortion must contain a health exception in order to survive constitutional challenge." 390 F. 3d at 59.

The court offered no argument in favor of this novel constitutional requirement. The court did not consider all the interests served by a parental notice statute, as this Court has repeatedly done in upholding such laws. The court adduced no empirical evidence whatsoever of high-risk pregnancies among minors, of minors' capacities to gauge those risks, or of the special benefits to minors of parental involvement in high-risk pregnancies. In fact, apart from its claimed dependence upon *Stenberg v. Carhart*[7] and *Casey*, the First Circuit's new *per se* rule rested upon that court's undefended assertion.

That dependence is misplaced.

Neither *Casey* nor *Stenberg* articulated a *per se* rule. Neither explicitly said that a "health" exception to parental

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[6] Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 922-24 (9th Cir. 2004); Planned Parenthood of the Rocky Mountain Serv., Corp. v. Owens, 287 F.3d 910, 915-16 (10th Cir. 2002).

[7] 530 U.S. 914 (2000).

involvement laws is constitutionally necessary. Neither said that *Hodgson* was overruled, or even imperiled.

Stenberg did hold that a health exception to an abortion regulation was constitutionally necessary. But that regulation was not a parental notice law. It was a state ban on all partial-birth abortions. *Stenberg* never addressed the issues raised in this litigation.

Casey did say that "foreclos[ing] the possibility of an immediate abortion despite some significant health risks" would violate "the essential holding of *Roe*." 505 U.S. at 880. The court below focused on this passage from *Casey*. It is true, too, that this excerpt from *Casey* was talking about, *inter alia*, a parental consent provision. But *Casey* did not mention *Hodgson* in or near that passage, scarcely a signal that *Hodgson* was being modified, much less overturned.

The *Casey* Court understood itself in the quoted passage, not to be making new law, but to be summarizing what *Roe* wrought. According to Casey, *Roe* held that a state may not "interfere with a *woman's choice* to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." 505 U.S. at 880 (emphasis added). This case involves no "woman's choice" with which the state could "interfere." It involves teenage girls who are legally presumed to be immature, and to lack the capacity to choose an abortion. *Roe* said nothing about minors' access to abortion or their parents' participation in it.

In its haste to invalidate New Hampshire's parental notification law, the First Circuit baldly declared this distinction to be irrelevant. Following the Ninth Circuit, the court lapsed into misguided reasoning by parity: a "health" exception "is as requisite in statutory or regulatory

provisions affecting only minors' access to abortion as it is in regulations concerning adult women." *Heed*, 390 F.3d at 61 (quoting *Wasden*, 376 F.3d at 922-24). The First Circuit thus implicitly repudiated the holdings of this Court in a slew of cases, including *Bellotti I* and *II*; *Akron I* and *II*; *Hodgson*; and *Casey*. All these cases say that the constitutionality of laws governing minors' access to abortion is one thing, and the access of adults, another.

Adult cases which speak of a health exception presuppose precisely that which parental involvement laws do not: a pregnant female *capable of giving legally effective consent* to an abortion. The adult woman calling for a health exception is mature. She is capable of exercising her liberty interest under *Roe* – and she has. Having registered her choice to abort, she stands under the umbrella of "privacy." Her legal situation without a health exception would be: the woman says "yes"; the state says "no." According to this Court's precedents, that simply will not do. The State may not "interfere" with a woman's settled determination to have an abortion. *See e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973), *reaff'd Casey*, 505 U.S. at 879 (plurality opinion).

The pregnant minor is an altogether different case. She is presumed to be incapable of saying "yes." Her stated desire for an abortion is inert, legally ineffective. It is a provisional indication, revisable, a wish – no matter how subjectively certain she might feel herself to be, no matter how strongly voiced is her wish. The pregnant teen's say-so about abortion is *not* effective, final, settled. Thus far considered the surgeon who lays hands upon her commits a battery. The state is thus *not* saying "no" to the woman's "yes." The teen's "yes" is, at most, inchoate consent. The state is saying instead to the pregnant girl:

"here is a legal process set up for you whereby, with the assistance of your parents and if need be our judges, you may *acquire* the legal capacity to say 'yes.'"

The First Circuit closed its eyes to the radical difference between minors and adult women. It is the difference which gives rise to a constitutional question in this case. It is the difference which this Court has on many occasions endorsed as the basis for abortion regulations which discriminate sharply between girls and women. *Casey* upheld parental notice and consent provisions, because they are "based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women." 505 U.S. at 895.

II. The Fallacious Reasoning by Analogy to Regulations of Adult Women's Abortions Exposed

A more formal way to express the ineptitude of the First Circuit's reasoning is this: suppose it to be true that the two groups of persons – adult women and unemancipated girls – stand on the same constitutional footing when it comes to abortion regulations. Reasoning by parity – *if* women, *then* girls – can tell you what is constitutionally required in a given situation, but only so long as two conditions are met. The first is that you must somehow figure out the answer regarding one of the subject classes. Only then could you know what is due the other class. The First Circuit reckoned that minors are entitled to a "health" exception *because* women are. The court took it as settled that women must have a "health" exception to ..... what? To which regulations? The First Circuit did not attempt to answer these questions.

The second condition is that the regulation itself must pertain to both groups. Identity of treatment is *impossible* with regulations unique to one or the other class. Reasoning by parity cannot reveal anything about what members of Group A deserve if there is no counterpart regulation in Group B's world. For example, a married female is considered in law to be an adult, no matter how old she is. No spousal notice requirement applies to minor girls; any exception for health to such a requirement could therefore tell us nothing about this case.

Similarly, here: because New Hampshire's parental notice law has no application to or counterpart in the adult world, it is idle to say that girls must have a health exception *because* adult women do.[8] Adult women are not subject to parental notice. We cannot even imagine that there *would be* a health exception to a parental notice law for women – if some hypothetical legislature were to pass one – because we know that law would be unconstitutional. We know *that* because we know that the whole starting point for parental notice laws is that minors are presumed to be immature and to lack the capacity to consent to medical treatment including abortion. We know that adult women are presumed to be mature and capable of consent.

Someone might object: there *is* an adult counterpart to the New Hampshire law; parity of reasoning *can* work. *Two* counterparts, actually, and an example of each can be found in *Casey*. The first is Pennsylvania's "informed consent" provision: "At least 24 hours before performing an abortion a physician [must] inform the woman of the nature of the procedure, the health risks of the abortion

[8] Actually, a close counterpart would be the treatment of women over the age of 18 who are incompetent, and the New Hampshire statute does, in fact, treat them in common.

and of childbirth, and the probable gestational age of the unborn child," except in case of "medical emergency." *Casey*, 505 U.S. at 881.

This objection gains some initial plausibility from the fact that the same "medical emergency" which excuses this informational session also excuses, according to the Pennsylvania law, the parental consent requirement for minors. *Id.* at 899. The surface similarity is that both laws aim (loosely speaking) to help a pregnant female make sure that she knows what she is doing when she chooses abortion. But there the comparison ends. It does not go nearly far enough to justify parity of reasoning.

Though a "medical emergency" would deprive adult women of some relevant information and of time for reflection upon it, they are – even without the information and time – *mature* and entirely *able* to decide what to do. A "medical emergency" may make their decision less informed and, in that sense, an imperfect choice. But a free and competent choice it still is.

A "medical emergency" deprives a pregnant minor, on the other hand, of parental advice or judicial counsel or both. In all events she remains what she was before the onset of medical complications: incapable of consenting to an abortion. Or worse: a minor's already immature judgment is likely to be impaired, not improved, by the news that (in the language of Pennsylvania's definition of "medical emergency") she faces "a serious risk of substantial and irreversible impairment of major bodily function."[9] *Id.* at 902.

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[9] Pennsylvania's law contemplates "medical emergenc[ies]" which render a woman (or girl) unconscious, or at least incommunicado, and thus absolutely incapable of registering her wishes, one way or another.

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The second alleged counterpart: *Casey* looked at and struck down a spousal notification provision. This law might casually be said to do what New Hampshire's law did: promote family involvement and solidarity in deciding about abortion. And so our objector might reason: *if* there must be a health exception to laws requiring spousal notice, *then* there has to be an exception for minors bound by parental notice laws.

The problem is that the two laws really serve vastly different points. Parental notice is mainly intended to assist an immature minor to make as mature a decision about childbirth or abortion as possible. The Pennsylvania legislature said that its spousal notice rule was meant to "promot[e] the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child." *Id.* at 908.

The First Circuit's reasoning by parity is a transparent evasion, a trick, a black hole full of words which cannot do any analytical work. Its misguided analysis is no more likely to yield the right answer than is turning over cards, or flipping a coin. It is reasoning by parody, not parity.

Unfortunately, almost everything in the First Circuit's opinion besides this parody is irrelevant to the problem at hand, too. Not only does the Great Counterpart – adult women and their "health" exceptions – tell us nothing. The

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"Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function." *Id.* at 903.

central constitutional test in the vicinity – *Casey's* "undue burden" standard – is also inapposite. It, too, presupposes what remains to be established: a legally effective *choice* for abortion by a competent female. And the core value beneath the abortion liberty itself – sovereign, self-defining choice upon matters central to personal identity – is largely unavailable to minors, as we shall now see.

III. The Touchstone of this Court's Abortion Jurisprudence – Free and Sovereign Individual Self-Determination – Has Diminished Relevance to the Unemancipated Minor.

Though *Roe* said a great deal about the role of medical personnel in abortion decisions, this Court left no doubt who was in charge: the pregnant woman. Though the *Roe* Court said that the woman is not isolated in her pregnancy, this Court left no doubt whose judgment is final: the pregnant woman's. This Court has said many times that states may pursue valuable interests, chiefly that in protecting unborn human beings, by and through abortion regulations. But those interests are, according to this Court, subordinate to the woman's choice. When all is said and done, it is almost impossible to overstate the centrality of sovereign and free individual choice to this Court's abortion jurisprudence.

But this touchstone's relevance to minors is much attenuated.

The *Casey* Court said that, in the decision to bear a child once conceived, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." *Casey*, 505 U.S. at 852. *Casey*, again: "the destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in

society." *Id.* at 852. The problem is, a teenage girl's "spiritual imperatives" are a work in progress for which, in other situations, the law supplies damage control. The complication is that the unemancipated minor's "place in society" is largely to operate under parental authority. The girl's legal disabilities arises, though, not *by* operation of law. They owe instead to inescapable realities of youth – inexperience, shortsightedness, dependence, poor judgment, character-in-progress – which the law recognizes but does create.

What makes this case so perplexing is that the minor girl is not existentially able to participate in the abortion liberty nearly as adult women do. Consider, for example, *Roe's* checklist of matters pertinent to a "woman's" decision about abortion:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Roe, 410 U.S. at 153.

How is the pregnant girl supposed to intelligently and freely exercise *this* liberty? The unemancipated minor lives at home and relies upon her parents for financial and emotional support. Will they be able to support her as a single mother, both financially and emotionally? Will they

want to? Will they be willing to share the burden of caring for the child, so that she may finish high school and, perhaps, go on to college? The pregnant teen knows even less about adoption and state financial assistance options than an adult woman. Will her parents help her find out what her options are? She has no way of knowing – and thus no way of making a knowing choice – if her parents have no idea she is seeking an abortion.

Other matters in orbit around the girl's deliberations cut much more deeply. The *Casey* Court highlighted that parents may discuss in private "the consequences of her decision in the context of the values and moral and religious principles of their family." 505 U.S. at 899-900. Who but her parents can provide the needed spiritual guidance in what has to be the most trying moment of a young girl's life? What is the morally *right* decision? What does my church (or synagogue or temple) say about abortion? Will family members criticize me for having an abortion? Will they criticize me if I do not?

Any serious effort to answer the question posed – does the Constitution require a "health" exception to a parental notice law? – will have to be cobbled together from the ground up, looking at all the relevant legal and empirical data, in light of all the pertinent constitutional values. Any answer must recognize, too, that the central aspiration of thirty-two years of abortion jurisprudence is scarcely within reach of minors.

IV. "Jane" – The Typical Unemancipated Teenage Girl at the Heart of This Case – Described

So far we have not really described the lead character in this story. So far we have referred to her generically as an "unemancipated minor" or as a "pregnant teen." We

can, however, put a more human face on our subject. We can flesh out the characteristic person that the New Hampshire statute covers.

Let us call her "Jane."

Jane is close to her sixteenth birthday, or has just turned sixteen. She is beginning her sophomore year of high school.[10] She is most likely to live with her two parents at home.[11] She is probably a low achiever in school, and a serious dropout risk.[12] Due to the recent downturn in the teenage job market, Jane is unlikely to be employed during the school year or even be able to find a summer job at the end of her sophomore year.[13] If Jane is lucky

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[10] *See* CTR. FOR DISEASE CONTROL AND PREVENTION, REPORTED LEGAL ABORTIONS OBTAINED BY ADOLESCENTS BY KNOWN AGE AND STATE OF OCCURRENCE – SELECTED STATES, UNITED STATES (1995) (giving the national percentage of adolescent abortions as 9% by those teenagers under 15 years old, 17.4% by those teenagers 15 years of age, 30% of abortions by those 16 years old, and 43.2% by those 17 years of age, for an average age of 16 years old for the teenager under 18 who has an abortion); ALAN GUTTMACHER INST., U.S. TEENAGE PREGNANCY STATISTICS: OVERALL TRENDS, TRENDS BY RACE AND ETHNICITY, AND STATE-BY-STATE INFORMATION 12 (2004) (giving an estimate in New Hampshire of 20 abortions by teenagers under the age of 15 and 230 abortions by teenagers between 15 and 17 years of age per year, for an average age of just under 16 years old as the average age for an abortion by a teenager under the age of 18).

[11] *See* U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN 3 fig. 1 (2001) (finding nationally that 77% of Caucasian children are living with two parents); U.S. CENSUS BUREAU, NEW HAMPSHIRE QUICKFACTS (2000), *available at* http://quickfacts.census.gov/qfd/states/33000.html (finding 96% of the New Hampshire population to be Caucasian).

[12] *See* Jennifer Manlove, *The Influence of High School Dropout and School Disengagement on the Risk of School-Age Pregnancy*, 8 J. RES. ADOLESCENCE 187, 187-220 (1998).

[13] *See* CTR. FOR LABOR MKT. STUDIES, NORTHEASTERN UNIVERSITY, THE SUMMER JOB MARKET FOR U.S. TEENS 2000-2003 AND THE

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enough to find employment, her earning potential as a high school student will be very low: even with full-time employment Jane will be unlikely to bring in more than $1300 a month, or $15,600 a year.[14] Finally, Jane is likely to believe that she does not have the ability to change her circumstances and will fail to understand how her personal choices affect her quality of life.[15]

Here is Jane, as our law sees her.

Jane is free to entertain the opinions and to hold the convictions of her choosing. But her *actions* upon them are limited by laws which either require her parents' consent before acting, or deny her the freedom to act altogether. In these situations the rest of the adult world acts at its legal peril. With prescription drugs, alcohol, sexual relations, financial transactions, medical treatment, and more: the law's message is unmistakable: Jane is no free agent. No solo flights allowed. *Caveat maiores*. This customer (patient, seller) operates under parental supervision – or not at all.

Jane's body is not entirely her own. Even with activities just slightly dangerous to her health – such as providing an aspirin or transporting her on a field trip – school officials across the nation must obtain the consent of her

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PROJECTED OUTLOOK FOR THE SUMMER OF 2004, 8 (2004) (describing the paltry 36.5% employment rate for those 16-19 years of age and the causes for the worst teenage unemployment rate since before World War II).

[14] *See* U.S. CENSUS BUREAU, WHAT'S IT WORTH? FIELD OF TRAINING AND ECONOMIC STATUS 6 tbl. D (2001) (listing $1300 per month as the average earnings for an 18-29 year old without a high school diploma).

[15] *See* Tamera M. Young et al., *Internal Poverty and Teen Pregnancy*, 36 ADOLESCENCE 289, 296-97 (2001).

parents before acting.[16] Laws throughout the country require parents' consent to such activities as body piercing or tattooing.[17] Many states prohibit Jane from using artificial sun tanning facilities without her parents' written consent.[18] In at least one state, school administrators must have a parent's note before they are allowed to apply sunscreen to Jane.[19] Regarding abortion – a surgical procedure involving a much greater health risk to Jane than sun tanning or providing an aspirin[20] – at least forty-four of the fifty

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[16] *See, e.g.*, WILLIAM D. VALENTE, 2 EDUCATION LAW: PUBLIC AND PRIVATE § 19.23 at 212 (1985).

[17] In 33 states, minors under the age of 18 are either absolutely prohibited from getting body piercings or are only allowed to obtain such if a parent consents. Brief for the Juvenile Law Center app. B at B5, Roper v. Simmons, 543 U.S. ___ (2005) (No. 03-633). Regarding tattoos, 42 states either absolutely prohibit youth under the age of 18 from obtaining a tattoo, or only allow a youth to obtain a tattoo if a parent consents. *Id.* at B27.

[18] *Id.* at B26.

[19] *See* Daniel de Vise, *Bill Would Legislate Maryland Students' Use of Sunscreen*, WASH. POST., Mar. 29, 2005, at B1.

[20] While the actual health risks of abortion are hotly debated, abortion researchers have reached a consensus that teenagers are one of the highest risk groups for post-abortion psychological harm. *See, e.g.*, N.E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 AM. PSYCHOLOGIST 1194 (1992); H.M. Babikian & A. Goldman, *A Study in Teen-Age Pregnancy*, 128 AM. J. PSYCHIATRY 755 (1971); N.B. Campbell et al., *Abortion in Adolescence*, 23 ADOLESCENCE 813 (1988); W. Franz & D. Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 ADOLESCENCE 161 (1992); C.D. Martin, *Psychological Problems of Abortion for Unwed Teenage Girls*, 88 GENETIC PSYCHOL. MONOGRAPHS 23 (1973); J.S. Wallerstein et al., *Psychological Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 ARCHIVES GEN. PSYCHIATRY 828 (1972). In addition to psychological harm, there exists the usual possibility for physical complications that attend any non-trivial surgical procedure.

states have laws which require some form of parental involvement.[21]

The law presumes Jane's immaturity in many other areas, too. All 50 states and the District of Columbia deny Jane the ability to make a valid will[22] and will allow her to void an otherwise valid contract.[23] Forty-seven states and the District of Columbia prohibit her from participating in lotteries, bingo games and/or pari-mutual betting,[24] while ten states prohibit Jane from engaging in many other forms of gambling.[25] The use of alcohol and tobacco by Jane is prohibited in all 50 states.[26] Forty-six states and the District of Columbia restrict the delivery of many types of firearms and/or prohibit the possession of certain firearms by Jane.[27] Jane cannot drive a car free of all restrictions in 42 states until she is 18,[28] and many states also prohibit transactions between pawnbrokers and Jane.[29]

The law's wariness of Jane's decision-making extends to constitutionally protected activities. Forty-seven states either absolutely prohibit the sale or delivery of pornography to Jane or only allow sale or delivery if her parents consent.[30] Her ability to freely associate is significantly curtailed, as four out of five U.S. cities with a population of

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[21] H.R. REP. NO. 109-051, pt. 1, at 6 (2005).

[22] Brief of the Juvenile Law Center app. B at B30, *Roper* (03-633).

[23] Id. at B9.

[24] *Id.* at B16-B19.

[25] *Id.* at 9.

[26] *Id.* at B4, B7.

[27] *Id.* at B13-B14.

[28] *Id.* at B12.

[29] *Id.* at B24.

[30] *Id.* at B25.

more than 30,000 impose a nighttime curfew for anyone under 18.[31]

All these laws illustrate what this Court has often recognized: compared to adults, Jane's capacity for reasoned judgment and for understanding and appreciating the full consequences of her choices is much diminished. As this Court has reaffirmed just recently, "any parent knows [that a] 'lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" *Roper v. Simmons*, No. 03-633, slip op. at 15 (U.S. Mar. 1, 2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). As compared to adults, "'minors often lack the experience, perspective, and judgment' expected of adults." *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

Common sense confirms the law's tutelage of Jane. (Ask any parent.) Science confirms the law's wisdom as well. Recent studies comparing teenage and adult decision-making have found that when asked to evaluate hypothetical decisions, teenagers were less likely than adults to mention possible long-term consequences, to evaluate both risks and benefits, and to examine possible alternative options.[32] In these studies adults performed

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[31] U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON YOUTH CURFEWS IN AMERICA'S CITIES: A 347-CITY SURVEY 1 (1997).

[32] *See* Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 APPLIED DEV. PSYCH. 257, 264-70 (2001); *see also* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18

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significantly better regarding the ability to weigh options available and resolve an issue than teenagers like Jane.[33]

Jane's reduced ability to assess probability is one factor in her poor decision-making.[34] Her lack of life experience is another.[35] She habitually fails to see the consequences of a particular course of action.[36] The ill-effects of her shortsightedness are aggravated by Jane's typically high sensitivity to peer influences.[37] State parental notification laws, then, just make compulsory what science and common experience already tell us: the best interests of Jane lie in having her parents involved in her decision-making process.[38]

BEHAV. SCI. & L. 741, 757 (2000) (noting that teenagers on average were "less responsible, more myopic, and less temperate than the average adult").

[33] Halpern-Felsher & Cauffman, *supra* note 32, at 268; *see also* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1, 1 (1992).

[34] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 344 (1992).

[35] *Id.* at 351-53 (finding that a teenager's more limited life experience makes it more likely that she will be unable to fully appreciate the future consequences of her action).

[36] *See, e.g.*, Cauffman & Steinberg, *supra* note 32, at 748, 754; Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEV. REV. 1, 28-29 (1991).

[37] *See, e.g.*, B. Bradford Brown, *Peer Groups and Peer Cultures*, *in* AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 171 (S. Shirley Feldman & Glen R. Elliot eds., 1990) (noting that teenagers are more susceptible to peer influence than adults); *see also* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescent Decision Making*, 20 L. & HUM. BEHAV. 249 (1996) (noting that teenagers have *lesser capacity* in the following elements of decision-making: *autonomous choice*, self-management, risk perception, and calculation of future risks).

[38] *See, e.g.*, Planned Parenthood Fed'n of Am., Inc., Fact Sheets: Teenagers, Abortion, and Government Intrusion Laws, *at*

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V. "Jane" Faces the Decision of Her Life.

Now Jane faces the most difficult and unnerving decision of her young life. She is pregnant, perhaps "surprisingly" so. She is by definition unmarried; a teenager who marries is thereby "emancipated" under the New Hampshire law.[39] No spouse is on hand with whom Jane can share her thoughts. None is there to care for Jane, or for the child. Jane is considering abortion; at least she is in touch with a doctor willing to perform one on her. But no matter what she thinks or feels or says, she has *not* chosen to abort. For she cannot: the law treats her desire for an abortion as tentatively as it does her wish for a tattoo, for her own checking account, for surgery: none of these can she choose for herself. Her parents must be involved.

Doctors inform Jane that her pregnancy and expectant motherhood – challenging and rattling as they are – are complicated by a serious health risk which, doctors say, has to be dealt with *now*. Delay of even two days, they say, is dangerous. Though she is free to call out to her parents for help, Jane does not wish to do so, at least not yet.

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http://www.plannedparenthood.org/library/ABORTION/laws.html (last visited June 23, 2005) ("Few would deny that most teenagers, especially younger ones, would benefit from adult guidance when faced with an unwanted pregnancy. Few would deny that such guidance ideally should come from the teenager's parents."); *see also* Nat'l Abortion and Reprod. Rights Action League, Young Women: Reproductive Rights Issues, *at* http://www.naral.org/Issues/youngwomen/index.cfm (last visited June 23, 2005) ("Responsible parents should be involved when their young daughters face a crisis pregnancy.").

[39] N.H. REV. STAT. ANN. § 132:25 (2003).

The doctors keep telling her to *choose* now. They are not proposing only a major medical procedure on her. That would be a big enough deal. If that were all there was to it, there would be no interesting legal question: in any other medical context, the doctors would have to obtain her parent's consent, or submit their best medical judgment to the tender mercies of emergency treatment laws. The distinguishing factor which takes *this* decision so utterly beyond her ken is that it will kill the child *in utero*. Jane carries a life within. She now holds it in her hands.

In this unsurpassably portentous setting, fraught with danger to mind, body and spirit what is the *outer limit* of the law? What help for Jane and her family does the Constitution permit? What assistance is absolutely ruled out? Is New Hampshire's handling of it within the field of acceptability? Or without?

Once the phony comparison to adult women is abandoned, and when we accept that abortion jurisprudence swings at an oblique angle from the case of the pregnant minor, one thing is for sure: comparisons to the adult world have nothing to say about it.

VI. This Court's Precedents Call For Parental Involvement as "Jane" Faces this Momentous Decision; the First Circuit Would Instead Abandon Her.

In *Hodgson* this Court identified "[t]hree separate but related interests – the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit" as relevant to a notice requirement. 497 U.S. at 444. *Hodgson* later observed that a waiting period "provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the

parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision on her future." *Id.* at 448-9.

How did the First Circuit follow through on these directions? The court in passing mentioned what it took to be the interests at stake. They were two. Instead of the "unborn child," the opinion below spoke of "the potentiality of life," and the court said nothing about the impact of abortion upon the child or even upon Jane of the decision to end the child's life. Where this Court spoke of parents' opportunity to aid their daughter's deliberations the lower court spoke tellingly of "protecting minors from undertaking the risks of abortion without the advice and support of a parent" – as if parents were introduced simply to help her get through an abortion presumed to be inevitable. *Heed*, 390 F.3d at 59. If that were so, parental notice laws would have nothing to do with effective consent (as they do). There would be no such thing as parental consent laws. There would be no need for any judicial bypass. In this corner of the First Circuit's world, it appears that minors are presumed, after all, to *be* grown-ups.

Perhaps one can imagine a legal response to Jane's predicament along those lines. Perhaps some state might declare that the minor who, a moment ago, was presumed incompetent is now competent to choose abortion. The occasion for this dramatic turn would be the fact, and only the fact, that her pregnancy has blossomed into a full-blown health crisis. Though your *amici* cannot think of anything to recommend this approach, maybe it is constitutionally permissible. But nothing in constitutional law

makes this desperate resort to fiction mandatory upon the states.

The First Circuit's conclusion held no suspense for the reader. "Regardless of the interests served by New Hampshire's parental notice statute, it does not escape the Constitution's requirement of a health exception." *Id.* at 60. And a peculiar "health" exception it is. The lower court referred often to cases, such as *Casey*, in which restrictive definitions of "health" were on offer. But the First Circuit never set out or adopted any definition. Nowhere in the opinion did the court say or suggest that the abortion doctor needed the minor's inchoate agreement – even if still not effective legal consent – to go ahead and abort. In this corner of the lower court's opinion, it seems that we have a wholesale transfer of legal authority over a pregnant teen and her unborn child to the treating physician. If the minor is still presumed to be incompetent, and the statute's call for parents or judges to help is deemed expendable, what else can it be called *but* a transfer of legal authority? Whenever the doctor judges that "health" risks call for an immediate abortion, there is no consultation with parents or a judge. The abortion will be done.

This "health" exception is all the more curious because it is supererogatory. Note that the alleged need for a health exception arises when treating medical personnel present think an abortion should be performed on a patient who is incapable of consenting to it. This is scarcely an exotic situation. New Hampshire law provides expressly authorized emergency medical treatment for any person "unable to give consent for any reason, including

minority," and where there is no one available legally authorized to consent.[40]

The New Hampshire Attorney General argued that these generally applicable provisions for emergency care without consent provided a "functional equivalent" to a health exception. *Heed*, 390 F.3d at 61. The Attorney General also drew the court's attention to general defenses to criminal liability for acts of "necessity." *Id.* The First Circuit granted that these statutes "could be cobbled together to preclude all civil and criminal liability for medical personnel who violate the Act's notice requirements in order to preserve a minor's health." *Id.* The court nevertheless denied that they were the functional "equivalent" of a health exception.

The articulated basis for this response was curious, too. The court said that the parental notice law superseded all these more general provisions, notwithstanding assurances of the state's chief legal officer that they did not. The First Circuit was also worried that in no case whatsoever might those performing an abortion be less than certain they were acting with utter legal impunity. Why this tiny fraction of the medical profession should enjoy legal immunities for performing surgery on non-consenting patients denied to all others practicing medicine in New Hampshire, the court did not explain.

The question taken up and answered by the First Circuit, then, is not really whether a "health exception" to the notice law is required. That was never disputed, as the Attorney General's submission made crystal clear. The

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[40] N.H. REV. STAT. ANN. § 153-A:18 (2003).

court held instead that an *exception* to the normal exceptions – and nothing less – was constitutionally required. At this point the puzzle is not so much *that* the First Circuit required a "health" exception. It is instead: what could that court possibly *mean* by a "health" exception?

Whatever exactly the court's "health" exception is supposed to mean, it surely means a release from parental and judicial brakes upon Jane's desires for an abortion, or her abortion provider's desires for her to have one, or, perhaps, some unstated and unstable amalgam of the two. It is a permissive rule; more abortion rather than fewer would thenceforth be performed on the "Janes" of New Hampshire.

What supports this expansive rule? Nothing from this Court's abortion cases. Nothing in popular opinion or extant legal practice.[41] And nothing in available data on what, in fact, women with high-risk pregnancies actually choose. The vast majority of women who have high risk pregnancies *do not* choose abortion merely because of the high risk of physical injury. For every 1,000 women who have live births, 246 women choose to have an abortion.[42] Of those 246 women, less than 3% – or 8 women – have an abortion because of a health reason.[43] In contrast, for every

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[41] *See supra* Part IV.

[42] CTR. FOR DISEASE CONTROL AND PREVENTION, ABORTION SURVEILLANCE – UNITED STATES, 2000, tbl. 2 (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5212a1.htm (last visited July 11, 2005). Both the abortion rate and the high risk pregnancy rate are based off of Year 2000 numbers.

[43] Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERS. 169, 170 tbl. 1 (1988). Recent state surveys have reported an even drastically lower percentage of women who chose abortion because of health reasons. *See, e.g.*, Ariz. Dep't of Health Serv., Characteristics of Women Receiving Abortions,

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1,000 women who have live births, more than 152 women are exposed to a serious health risk during pregnancy, such as eclampsia, anemia, hypertension, and hydramnios.[44] Thus, out of 152 women who have a high risk of physical injury during pregnancy, 95% of them will *not* end their pregnancy and choose abortion because of a serious health risk.[45]

The permissive effect of the First Circuit's zealous opinion, then, is nothing less than this: according to the best statistical evidence, many "Janes" in New Hampshire – and across the United States depending on what this Court does – will receive abortions which they do not really want.

1993-2003, tbl. 1D-1, *at* http://www.azdhs.gov/plan/report/ahs/ahs2003/xls/t1d1.xls (last visited July 12, 2005) (finding that the mother's health was the reason given in only .5% of abortions where the woman reported the reason for termination between 1993-2003); FLA. DEP'T OF HEALTH, FLORIDA VITAL STATISTICS ANNUAL REPORT, 2003, tbl. T-2 (2003), *available at* http://www.doh.state.fl.us/Planning_eval/vital_statistics/03Vitals/termination.pdf (last visited July 11, 2005) (finding a health reason for termination of an abortion in only .5% of abortions with a reported reason for termination in 2003).

[44] CTR. FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS REPORT, 2000, at 57 tbl. 26 (2002).

[45] This is not inconsistent with the New Hampshire Act's permission to doctors to perform an immediate abortion where delay might kill the mother. Though many women would run even that risk for the benefit of their child *in utero*, most probably would not. The restrictive abortion laws before *Roe* also held that, in such tragic conflicts, mothers could justifiably preserve themselves. This history as well as the morality of the situation surely support the view that such a systematic legal preference for the mother is constitutionally permissible. But neither what is commonly chosen today nor legal history nor morality supports a systematic preference to abort the child *in utero* wherever there is a health risk.

VII. New Hampshire's Law Fits Comfortably Within Constitutional Bounds, and Is Typical of How the Law in our Country Provides for Minors Making Important Decisions.

There *is* an "if-then" form of reasoning at the center of sound thinking about Jane, her pregnancy, and abortion. It is not the First Circuit's question-begging adult-minor syllogism. It is instead the realm of true counterparts to pregnancy and abortion. These comparable matters resemble Jane's present challenge because they are big decisions, laden with long-term consequences. They resemble abortion in another way; in fact, they are part of the same set of issues. According to New Hampshire law – here, typical of laws across the country – Jane may not marry the father of her child *in utero*; have any surgery at all during pregnancy; or give her baby up for adoption *without* her parents' consent. And, being just now on the cusp of her sixteenth birthday, the sexual intercourse by which she came to be with child was *per se* illegal. Not even parental license can dispense with the criminal law's absolute and conclusive presumption that girls under sixteen cannot consent to sex. It is known as statutory rape.

New Hampshire's general provision for parental authority is typical of the national legal consensus, too: a "parent" has the "duty and authority to make important decisions in matters having a permanent effect on the life and development of the child."[46] Their guardianship empowers them to withhold medical treatment of Jane –

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[46] N.H. REV. STAT. ANN. § 169-C:3(XIV) (2003).

no matter how much *she* wants it – for all "major medical, psychiatric and surgical treatment."[47]

Many of the girls covered by New Hampshire's law – all those under 16 – are conclusively presumed to be incapable of consenting to sexual intercourse, no matter how much they desire it, no matter how willing nearby adults may be to accommodate them, and no matter how much good all present think it would be for any such willing girl.[48] New Hampshire law also stipulates that a birth mother less than eighteen years of age – Jane, for example – may surrender her parental rights, subject to the court's authority to require her parents' "assent."[49] Of course Jane *may* consult her parents about abortion. This case supposes that she does not wish to. But why should the law be bound to treat *that* desire as mature, well-considered, and legally effective? The law is not bound to do so in any other medical or sexual or family context.

This context is all the more serious because Jane is not alone. It is not just about long-term consequences to *her*. An unborn child's life is involved. *Casey* said that the law's insistence upon informed consent furthers the "legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed," especially with regard to its impact upon the unborn child. 505 U.S. at 882.

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[47] *Id.* § 169-C:3(XIV)(a)(3) (2003).

[48] *Id.* § 632-A:3(II).

[49] *Id.* § 170-B:5(I)(a).

It is easy to see that a girl accepting the burdens of motherhood is making a life-altering decision. Perhaps that is why some observers, perhaps including the court below, prefer that she forego such lasting responsibilities at her age. But the choice to abort lasts, too. It is, according to every statement of this Court on the matter, a paramount *moral* choice with lasting *spiritual* effects. The decision will linger in Jane's character; it will make her into a certain kind of person. She may be free after abortion to pursue interests and pleasures and dreams which being a mother would have postponed. But she is not necessarily free of memory and – as *Casey* suggests – regret and even guilt. Indeed, Jane's choice to carry the baby to term can be undone, in that she can choose adoption at any point thereafter. But Jane's choice to abort her baby is beyond revision or recall.

These intensely personal aspects of the abortion decision have been at the ground of this Court's decisions keeping the heavy hand of government at bay. But those decisions do not imply nor do they suggest that Jane – an unemancipated minor – must be left *alone*. She need not be. She should not be. And, were it not for the New Hampshire parental notification law, Jane would face the gravest crisis of her life without guidance from the two people who know her the most intimately: her mother and her father. Without their help, she is unlikely to foresee the possible psychological, physical, social, educational, and economic ramifications of her choice. Without an appreciation of the future consequences of her abortion decision, Jane may be making no choice at all. She may be held hostage by her – and her peers' – worst fears and suspicions.

If Jane's parents are in the dark, she may be effectively denied a real opportunity to choose, as surely as if the state made the decision for her.

CONCLUSION

The judgment of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

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(4)

No. 04-1144

IN THE
SUPREME COURT OF THE UNITED STATES

KELLY A. AYOTTE, ATTORNEY
GENERAL OF NEW HAMPSHIRE
Petitioner

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, et al
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF NEITHER PARTY

Interest of *Amicus Curiae*

The *amicus curiae* brief, attached hereto and incorporated herein by reference, defends the constitutional right to life of the unborn which the parties have not done. It supports neither party.

Consent to File

The respondent *Planned Parenthood*, but not the petitioner *Ayotte*, gave written consent to file this *amicus curiae* brief.

Argument

The *amicus curiae* proves that the U.S. Constitution's universal guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn.

This disposes of all issues in this case.

Conclusion

Wherefore, counsel asks the court to grant this motion for leave to file this *amicus curiae* brief.

Alan Ernest
Counsel

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Bennett v. *State*, 377 P 2d 634 (1963).....11

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Cohens v. *Virginia*, 6 Wheat. 264 (1821).....14

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Ernest v. *U.S. Attorney for the Eastern District of Virginia, U.S. Attorney General*, cert. denied 475 U.S. 1085 (1986).....12, 13

Ernest v. *Rehnquist, Stevens, Breyer O'Connor, Scalia, Souter, Thomas, Ginsburg, etc., U.S. Attorney, etc., U.S. Attorney General*, in the U.S. District Court in Alexandria, Civil No. 89-732A.....13

Federal Constitutional Court of West Germany, 1 BVerfG 39, reported in R. Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 Cal. L. Rev. 1250 (1975).....3, 25

Gulf, Colo. and S. Fe RR v. *Ellis*, 165 U.S. 150 (1896).....3-4

Hamilton v. *United States*, 26 App D.C. 382 (1905).....10

Lamb v. *State*, 67 Md. 524 (1887).....19

Table of Authorities - *Continued*

Marbury v. *Madison*, 1 Cranch 137 (1803).....13, 27

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Ogden v. *Saunders*, 12 Wheat. 213 (1827).....13

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Pollard v. *Dwight*, 4 Cranch 421(1807).....11

Porter v. *Lasiter*, 87 SE 2d 100 (1955).....11

Regina v. *West*, 2 C & K 784 (1848).....9

Ross v. Oregon, 227 U.S. 150 (1912).....28

Santa Clara v. *So. Pac. RR*, 118 U.S. 394 (1986).....16

Singleton v. *State*, 35 So 2d 375 (1948).....11

Smith v. *State*, 33 Me. 48 (1851).....22

State v. *Anderson*, 343 A. 2d 505 (1975).....11

State v. *Reed*, 45 Ark. 333 (1885).....19

State v. *Slagle*, 83 N.C. 544 (1880).....19

Sturges v. *Crowninshield*, 4 Wheat. 122 (1819).....16

United States v. *Altstoetter* [The Justice Case], 3 Trials of War Criminals Before the Nuernberg Military Tribunals (1951).....14

United States v. *Hale*, 422 U.S. 171(1975).....27

Watson v. *State*, 117 A 2d 549 (1955).....11

Yick Wo v. *Hopkins*, 118 U.S. 356(1986) 16

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J. Archbold, *Complete Treatise on Criminal Procedure, Pleading and Evidence* (7th ed. 1860).....9

J. Bishop, *Commentaries on the Criminal Law* (4th ed. 1868).....10-11

Black's Law Dictionary (Rev. 4th ed. 1968).....17

Blackstone, *Commentaries* 9, 29

L. Burdick, 2 *The Law of Crime* (1946).....1,

Winston Churchill, *The Gathering Storm* 262 (1948).....29

Coke, *Institutes* 9, 11

T. Denman, M.D., *Introduction to the Practice of Midwifery* (1802).....20, 21

Alan Ernest, *Mass Murder Is Liberty: How The United States Is Ruled By the Decree MASS MURDER IS LIBERTY* (1998).....29

The Federalist, No. 10 (James Madison).....1

Hawkins, *Pleas of the Crown*.....9

H. Hodge, M.D., *The Principles and Practice of Obstetrics* (1864).....24, 25

O.W. Holmes, *The Common Law* (Howe ed.1963).....28

T. Jefferson, *The Writings of Thomas Jefferson* (Berg ed. 1907).....9

A. Lincoln, *Collected Works of Abraham Lincoln* (R. Basler ed. 1953).....2, 5

McCormick's Handbook of the Law of Evidence (Cleary ed. 1972).....26

G. Orwell, *1984* (1949).....29

R. Perkins, *Perkins on Criminal Law* (2d ed. 1969).....11, 28

Plato (Jowett translation, 1942).....26

F. Rambotham, M.D., *Principles and Practice of Obstetric Medicine* (4th ed. 1856).....21

W. O. Russell, 1 *Treatise on Crimes and Misdemeanors* (4th ed. 1865).....9

B. Schwartz, *Statutory History of the United States: Civil Rights* (1970).....6

H.R. Storer, M.D., *On Criminal Abortion in America* (1860).....22-23

A. S. Taylor, *Manual of Medical Jurisprudence* (Penrose Am. ed., 6th ed. 1854).....10, 11

A. Velpeau, M.D., *Complete Treatise on Midwifery* (4th Am. ed. 1854).....21

G. Washington, *The Writings of George Washington* (Fitzpatrick ed. 1940).....14

F. Wharton, *A Treatise on the Criminal Law of the United States* (5th ed. 1861).....22

F. Wharton, *Wharton's Criminal Law and Procedure* (12th ed. 1957).....11

F. Wharton, *Treatise on the Law of Homicide in the United States* (1855).....11

Wigmore, *Evidence* (Chadborn Rev. 1972).....26

Motions and Briefs Filed in this Court:

Brief on behalf of the State of Georgia, *Doe* v. *Bolton*, 410 U.S. 179 (1973).....7

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Model Penal Code (Proposed Official Draft 1962)..... 28

R. Penrose M.D., *Discourse on the Life of H.L. Hodge* (1872).....25

E. Quay, *Justifiable Abortion: Medical and Legal Foundations*, 49 Geo. L.J. 395 (1961).....19

Transactions of the American Medical Association (1860).....24

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INTEREST OF THE AMICUS CURIAE

The *amicus* defends the constitutional right to life of unborn children which the parties have not done.

SUMMARY OF ARGUMENT

The U.S. Constitution's guarantee of life to "any person," made in its 5th and 14th Amendments, does include the unborn.

ARGUMENT

I.

THE U.S. CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

The Declaration of Independence announced that reverence for life is America's founding principle. It said that all men are created equal, all are endowed by their Creator with an unalienable right to life, and the purpose of government is to protect the life of everyone.

America told the world that if we will follow our reverence for life wherever it may lead, then a future of more abundant life, which we can look forward to with hope, will unfold before us. On the other hand, Madison warned that the primitive idea, that some can gain by harming others, had ruined all democracies known to history.[1] And the lethal inventions of science have made reverence for life the only way to the future.

A. On its Face, the U.S. Constitution's Guarantee of Life to "Any Person" Does Include the Unborn

This guarantee of life to everyone was incorporated into the U.S. Constitution. The 14th Amendment's guarantee of life reads: "(N)or shall any State deprive ***any person*** of

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[1] *The Federalist*, No. 10 (James Madison).

Rule 37.6 disclosure: Counsel authored the whole *amicus* brief; no monetary contributors are required to be identified.

life…without due process of law." (emphasis added).

The words "any person" are universal, admit of no exceptions for anyone, make no distinction between born and unborn life, and on their face include the unborn, the same as everyone else. The obvious purpose of guaranteeing life universally to "any person" was to prohibit government officials making exceptions so some persons could be exterminated.

The Court admitted that if the word "person" included the unborn, then *Roe* v. *Wade* "collapses," because the lives of the unborn would be "guaranteed" by the Constitution.[2] But the Court implied that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[3] Thus the Court hit the Constitution head-on, directly defied its express prohibition of extermination, and condemned to death those victims whom the Constitution, by its plain words, endeavors to preserve.

The words "any person" are the two most important words ever written into law because they protect the lives of everybody from extermination, and they summarize America's unique contribution to civilization. As Lincoln said, what made America great was the promise "that ***all*** should have an equal chance."[4] (emphasis in text).

The words "any person" are the words which guarantee that equal chance to live to ***all***, they stand as the supreme political achievement of the human race, the prize of millenniums of struggle. If the Constitution had stated it protected the life of "any person - except the unborn," then its words would support *Roe* v. *Wade*. But its words say "any person," without any exceptions.

The Court ruled that the words "any person" included

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[2] *Roe* v. *Wade*, 410 U.S. 113, 156-157 (1973).

[3] *Id.*, at 158.

[4] 4 *Collected Works of Abraham Lincoln* 240 (R. Basler ed. 1953).

Chinese aliens, merely saying the words are "universal in their application, to all persons…without regard to any differences." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886).

In 1975, the Supreme Court of West Germany held that the words in its Constitution, "Everybody has the right to life," did include the unborn. It explained that the word "everybody" is universal.

But in *Roe* v. *Wade*, the Court ignored the letter of the law. Instead the Court focused on the isolated word "person," and ignored its modifier "any." Yet "any" is the word which means "all," and extends the right to life to everyone without any exceptions.

By reading the universal guarantee of life to "any person" as if it were merely a guarantee to "some persons," the Court did the most forbidden thing, and reduced the most important law in history to nothing.

The Constitution extends its guarantee of life to "any person." The letter of the law permits no exceptions. On their face the universal words "any person" do include the unborn.

B. The Spirit of the Law Proves that the U.S. Constitution's Guarantee of Life to "Any Person" Does Include the Unborn

Roe v. *Wade* violates the spirit of the law, as well as its letter. The Court itself ruled that the Declaration of Independence is the spirit of the Constitution:

> The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life…" While such declaration of principles may not have the force of organic law…yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of

> the Declaration of Independence. No duty rests more imperatively upon the courts than...to secure the equality of rights which is the foundation of free government.
> *Gulf, Colo. & S. Ry* v. *Ellis*, 165 U.S. at 159-160 (1896).

There is no real medical dispute that the unborn have been created and are alive.[5] So reading the letter of the Constitution, the universal guarantee of life to "any person," in the spirit that ***all*** are "created equal," and ***all*** shall get their chance to live, permits only one conclusion - that the words "any person" do include the unborn.

C. History Confirms that the Constitution's Guarantee of Life to "Any Person" Does Include the Unborn

In addition to the letter and spirit of the law, the universal embrace of this guarantee of life to "any person" is also evident from its history. The last time the Court implied an exception to the words "any person" was *Dred Scott* v. *Sandford*, 19 How. 393 (1857). There the Court ruled that: the word "person," as used in the Fifth Amendment, did not include Negroes because they were not persons in the whole sense; the phrase in the Declaration of Independence, "all men are created equal," did not include Negroes; there was a constitutional right to own a slave ("the right of property in a slave is distinctly and expressly affirmed in the Constitution"); Congress could not prohibit slavery in the territories; people were free to choose whether or not to own slaves; and Negroes could not sue in federal courts to see if they were slave or free.

Abraham Lincoln opposed the *Dred Scott* decision. If officials can say all men are created equal except Negroes, he

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[5] The medical evidence in the Texas brief in *Roe v. Wade* showed the fetal heart begins "pulsations at 24 days," and "brain waves have been noted at 43 days," and the unborn child is "alive."

asked, "where will it stop?"[6] If officials can say the Declaration does not include blacks, Lincoln argued that they can say it doesn't include any other person. He claimed *Dred Scott* was based on "falsehood."[7] He alleged a conspiracy by the U.S. Supreme Court, two U.S. Presidents, and leading members of Congress to overturn the U.S. Constitution and impose a slave empire on America.[8]

Lincoln said he would not obey *Dred Scott*. Citing both Thomas Jefferson and Andrew Jackson as authority,[9] he said the president swears an oath to obey the Constitution as he understands it, and not as it was understood by the Supreme Court. If the president were bound by *Dred Scott*, Lincoln explained in his First Inaugural Address, "the people will have ceased, to be their own rulers."[10]

Dred Scott triggered a civil war. Various States withdrew from the Union rather than be deprived of their constitutional right to own a slave, as decreed by the Court. President Lincoln defied the Court's *Dred Scott* decision, that there was a constitutional right to own a slave, because he emancipated the slaves and declared them to be "forever free."[11] He reminded us at Gettysburg that we were fighting to see whether a nation dedicated to the proposition that "all men are created equal" could long endure.

One of the framers of 14th Amendment explained that its purpose was to rededicate America to its original proposition: "It establishes equality before the law, and it gives to the humblest...the most despised...the same protection before the law as it gives to the most powerful....Without this...there is no republican government." Rep. Jacob Howard, quoted in

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[6] 2 *Collected Works of Abraham Lincoln* 500 (R. Basler ed. 1953).
[7] *Id.*, 495.
[8] *Id.*, at 461-469, 521.
[9] *Id.*, at 402, 516-17.
[10] 4 *Collected Works of Abraham Lincoln* 268 (R. Balser ed. 1953).
[11] 6 *Collected Works of Abraham Lincoln* 28-30 (R. Balser ed. 1953).

B. Schwartz, 1 *Statutory History of the United States: Civil Rights* 262 (1970).

The framers of the Fourteenth Amendment learned from *Dred Scott*. They said the Supreme Court must never again imply exceptions to the words "any person." They employed the universal words most suited for this purpose.

And by the middle of the 19th century, medical science had discovered that an unborn child was alive throughout gestation, and there was no time during gestation when science could draw a line and say the unborn were not alive. By the time the Fourteenth Amendment was adopted in 1868, the vast majority of States had already enacted criminal abortion laws to protect all stages of unborn life, and within a few years such laws were universal.

The history of these criminal abortion laws shows that the framers and adopters of the Fourteenth Amendment intended its universal guarantee of life to "any person" to mean what it says, and to include the unborn the same as everyone else.

Yet *Roe* v. *Wade* is another *Dred Scott* disaster. The Court assumes that, without one word of explanation, the framers intended their guarantee of life to "any person" to sweep away all their abortion statutes and make the killings, which they said were criminal, into "liberty." The Court assumes that the framers connived to repudiate a major point of the Civil War, so judges would again be at liberty, as in *Dred Scott*, to convulse society by implying more exceptions to the words "any person." And the Court amends the Declaration of Independence to read "all men are created equal - except those created to be killed." The Court claims it can decree who was created to be killed.

The Court did the most forbidden thing: it directly defied the Constitution's express guarantee of life to "any person," and decreed criminal extermination to be legal.

The Fourteenth Amendment's letter, spirit, and history allow only one conclusion: the express and universal guarantee of life to "any person" does include the unborn.

II.

ROE v. *WADE* IS VOID BECAUSE IT CRIMINALLY DEFIED THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

A.

Roe v. Wade Criminally Defied the Constitution's Guarantee of Life to "Any Person" Because the Court Decreed Killings to Be "Liberty" Which the People Had Defined to Be "Murder." In Effect, the Court Decreed MASS MURDER IS LIBERTY.

When *Roe* v. *Wade* was decided in 1973, an abortion was murder if the child was "born alive." A child could be "born alive" during second or third trimester abortions. Indeed, the State of Georgia forewarned the Court that certain abortions were "murder."[12] But the Court scorned that warning and decreed those very killings to be "liberty."[13]

In 1976, a physician explained to Congress that *Roe* v. *Wade* permitted second trimester hysterotomy abortions, and children killed by this abortion procedure can be "born alive":

> "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were **born alive**."[14] (emphasis added)

The physician showed Congress this photograph of a child

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[12] *Doe* v. *Bolton*, 410 U.S. 179 (1973), Brief for Appellees 52-53.

[13] *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). The Court decreed a right to abortion to be "founded in the Fourteenth Amendment's concept of personal liberty."

[14] Hearings on Constitutional Amendments on Abortion, before subcomm. On Civil and Constitutional Rights, of the House Comm. Of the Judiciary, 94th Cong., 2d Session, Ser. 46, Part 1 at 397 (1976).

killed by a salt poisoning abortion. He said this method could also result in a child being "born still alive."

For almost four centuries, Americans had defined such killings to be "murder." But in 1973 the Court decreed such killings to be "liberty."

And by 1973, States had decided that in the third trimester a child need not be "born alive," but was a human being within their homicide or murder statutes if the child were killed "in the process of being born."[15] But the Court also decreed those murders to be "liberty."[16] Indeed under *Roe* v. *Wade* doctors kill children in the very process of being born.

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[15] *People* v. *Chavez*, 77 Cal. App. 2d 621, 626 (1947).

[16] *Doe* v. *Bolton*, 410 U.S. 179 (1973). The Court decreed that abortions could be performed in the third trimester to protect the woman's "health," which the Court ruled included "all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well being of the patient."

1. The Court Decreed Killings to Be "Liberty" Which Americans Had Condemned as "Murder" Since Earliest Colonial Times.

America's first settlement at Jamestown followed the English common law, as did other colonies. The common law defined an abortion, in which a "quick" (about 4 months gestation) child died after being "born alive," to be "murder."[17] Even if not yet viable, if the child was "born alive," Coke (the standard 17th century legal authority) condemned the abortion as "so horrible an offense" and "this is murder."[18] Jefferson wrote that Coke's work was "the fundamental code of English law"[19] which makes it a foundation of American liberty.

The English writers cited this as the correct statement of the law.[20] And English courts followed this law.[21]

The English common law was the law of the land in colonial America. By allowing second and third trimester abortions, the Court decreed killings to be "liberty" which Americans had defined to be "murder" since earliest colonial times.

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[17] Coke, 3 *Inst.* 50; Hawkins, 1 *Hawkins* Ch. 13, s. 16; Blackstone, 4 *Bl. Com.* 198.

[18] Coke, 3 *Institutes* 50.

[19] Jefferson wrote of Coke's *Institutes*: "This work is executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judicially denied....It may still be considered as the fundamental code of English law." Thomas Jefferson, 14 *Writings of Thomas Jefferson* 57 (1907). Jefferson served on the 1776 committee which adapted Virginia's laws to republican form, the common law being assigned to him.

[20] J.F. Archbold, 1 *Complete Treatise on Criminal Procedure, Pleading and Evidence* 783 (Waterman Am. Ed. 7th ed. 1860); W.O. Russell, 1 *Treatise on Crimes and Misdemeanors* 671-672 (4th ed. 1865).

[21] *Regina* v. *West*, 2 C & K 784 (1848).

2. The Court Decreed Killings to Be "Liberty" which the Framers and Adopters of the Fourteenth Amendment Had Defined to Be "Murder."

The English common law is the dictionary which American courts use to construe the state and federal homicide statutes.[22]

By the time the Fourteenth Amendment was adopted in 1868, American legal authorities and State supreme courts had long followed the common law rule that second and third trimester abortions were murder if the child were born alive. And viability was irrelevant. If death were caused by the child being too immature to survive outside the womb, the abortion was murder.

In 1859 the American Medical Association reported the law of murder which existed throughout the United States:

> If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it into a situation in which it cannot live, is guilty of ***murder***.[23] (emphasis added).

This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.[24] This definition of murder was approved by the preeminent legal

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[22] *Clarke* v. *State*, 117 Ala. 1 (1898); *Hamilton* v. *United States*, 26 App. D.C. 382 (1905).

[23] Reported in A. S. Taylor, *A Manual of Medical Jurisprudence* 462 (6th ed. 1866). He described the AMA report as "a complete and comprehensive exhibit of laws of each of the United States." Id., at 460.

[24] J. P. Bishop, 2 *Commentaries on the Criminal Law* 365 (4th ed. 1868); A. S. Taylor, *supra* note 23, at 462, 517 (1866).

writers of the 19th century,[25] and it was adopted by State supreme courts.[26] It was still the law in 1973.[27] In 1975 the New Jersey courts applied this law of murder to an unviable fetus born alive:

> That a fetus may be the victim of murder if it be born alive has long been a part of our common law....Coke, *Institutes* 58 (1648).[28]

For almost four centuries governments came and went in America, but this law of murder endured as the law of the land. And it is binding on the U.S. Supreme Court.[29]

Yet the Court ruled that States could not protect unborn life until the third trimester which the Court set at viability- "about 7 months."[30] But in effect (due to the Court's definition of the mother's "health") States could not protect unborn life anytime prior to actual birth. Thus the Court decreed both second and third trimester abortions to be "liberty" which the framers and adopters of the Fourteenth Amendment had defined to be "murder."

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[25] F. Wharton, *A Treatise on the Law of Homicide in the United States* 93 (1855); Bishop, *supra* note 24; Taylor, *supra* note.23.

[26] *Clarke* v. *State*, 117 Ala. 1 (1898); *Watson* v. *State*, 117 A 2d 549 (1955); *Porter* v. *Lassiter*, 87 S. E. 2d 100 (1955); *People* v. *Chavez* 176 P. 2d 92 (1947); *Bennett* v. *State*, 377 P.2d 634 (1947); *Singleton* v. *State*, 35 So. 2d 375 (1948).

[27] 2 L. Burdick, *The Law of Crime* 156 (1946); 1 *Wharton's Criminal Law and Procedure* 434 (12th ed. 1957); R. Perkins, *Criminal Law* 30 (2d ed. 1969).

[28] *State* v. *Anderson*, 343 A. 2d 505, 508 (1975), aff'd 413A.2d 611 (1980). The court rejected the claim it was not murder because "the infants were never capable of maintaining a separate and independent existence." *Id.* at 615.

[29] The Court must accept the construction given by a state to its own statute. *Pollard* v. *Dwight*, 4 Cranch 421, 429.

[30] *Roe* v. *Wade*, supra, 160, 163.

3. The U.S. Supreme Court and the U.S. Government Claim Power to Decree the Mass Murder of Jews, or Anyone Else, to Be Liberty.

Of course, if the U.S. Supreme Court can decree the mass murder of some persons to be liberty, then it can decree the mass murder of anybody to be liberty.

Indeed, when the U.S. Supreme Court was accused of mass murder in the U.S. District Courts, the U.S. Government defended its Justices by expressly claiming that its Supreme Court must be obeyed even if it decreed the mass murder of Jews, or anyone else, to be liberty. An incredulous U.S. District Judge asked the U.S. Government:

> **[U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in *Roe v. Wade* took a discrete group of entities and said that these entities have no right to live, and thus may be killed .... And he said if you take *Roe v. Wade* and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said "Jews." That is the one he used in his brief.**
>
> **Would you argue stare decisis to me if,under Roe v. Wade, at the whim of neighbors Jews could be put to death?**
>
> **[U.S. Govt. Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.**[31]

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[31] *Ernest* v. *U.S. Attorney for the Eastern District of Virginia and U.S. Attorney General*, U.S. District Court in Richmond, Civ. No. 84-0858, transcript of proceedings at 21-22. This complaint attacked the validity of *Roe* v. *Wade* on the grounds that the U.S. Supreme Court cannot lawfully decree mass murder to be liberty. It demanded that the District Judge refuse to obey *Roe* v. *Wade*.

As victims were being killed in defiance of murder statutes, the U.S. District Judge adopted the U.S. Government's claim that he must obey the U.S. Supreme Court even if it decreed the mass murder of Jews, or anyone else, to be liberty. And on review, not one Justice had any objection to this ruling.[32]

And the Justices were accused of mass murder in a U.S. District Court on the grounds they cannot lawfully decree mass murder to be liberty. Each Justice defended himself or herself by claiming all lower courts must obey the U.S. Supreme Court "no matter how misguided" its decrees may appear to be.[33]

Thus both the U.S. Government and its U.S. Supreme Court maintain the killings by officially claiming the power to decree the mass murder of Jews, or anyone else, to be liberty.

4. The U.S. Supreme Court Has Committed Treason to the U.S. Constitution.

Chief Justice John Marshall would have called *Roe* v. *Wade* "treason to the Constitution." In *Marbury* v. *Madison*, he wrote that the purpose of the Constitution was to control the government, including judges, and the intention of its framers is the law.[34] He later ruled that the Court could not extend the Constitution "to objects not...contemplated by its framers."[35] And Marshall warned that if the Court usurped

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[32] *Ernest* v. *U.S. Attorney for the Eastern District of Virginia, and U.S. Attorney General*, cert. Denied 475 U.S. 1084 (1986).

[33] *Ernest* v. *Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc., U.S. Attorney, etc., U.S. Attorney General*, et al, U.S. District Court in Alexandria, Civil No. 89-732-A, Defendants' *Motion to Dismiss*, page 3. The District Court adopted this argument as law by summary decree, refusing to even allow a hearing.

[34] *Marbury* v. *Madison* at 176-180 (1803).

[35] *Ogden* v. *Saunders*, 12 Wheat. at 332 (1827).

such power, it would be "treason to the Constitution."[36]

The officials to be controlled are not free to invent a constitution more to their liking. Lawless officials can overthrow a constitution as surely as armed rebels. Indeed President George Washington warned that "change by usurpation" was "the customary weapon by which free governments are destroyed."[37]

By decreeing killings to be "liberty" which the framers had defined to be "murder," the Court exactly extended the Constitution to objects not contemplated by its framers. The Court confronts the nation with the boldest and plainest case of officials committing "treason to the Constitution."

By merely changing the names of the victims being killed, the U.S. Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany. At Nuremberg the Nazi judges claimed they could not be prosecuted for complicity in extermination and murder because "the supreme judge" had decreed the killing of Jews and other minorities to be legal, and they were obligated to obey the decrees of their supreme judge.[38] But the United States prosecuted Nazi judges for obeying their supreme judge.

Now U.S. officials conspire to impose the same Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg. This

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[36] *Cohens* v. *Virginia*, 6 Wheat. at 404 (1821).

[37] George Washington, 35 *The Writings of George Washington* 229 (Fitzpatrick ed. 1940). (Washington's Farewell Address)

[38] *United States* v. *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011-1014 (1951). Hitler claimed the emergency provisions of the Weimar Constitution gave him power to act as "the supreme judge." As such he decreed the killing of Jews and other minorities to be legal. Nazi judges claimed they could not be held accountable for complicity in extermination and murder, since they had acted "within the authority" of the "decrees" of "the supreme judge." *Id.* at 983-85. But the Tribunal rejected that defense: "The dagger of the assassin was concealed beneath the robe of the jurist." *Id.*, at 985.

Court claims power to decree the mass murder of Jews, or anyone else, to be legal; and government officials claim they must obey such decrees.

America has surrendered the promise that everybody has an unalienable right to life and the purpose of government is to protect the life of everyone. Now the lives of all Americans depend on the whim of government officials, as in Stalin's Russia or Hitler's Germany.

When U.S. Officials conspire to impose Nazi doctrines on the United States, then no honest person can doubt that these officials have committed treason to the U.S. Constitution.

5. The United States Being Ruled By a Giant Conspiracy to Mass Murder Is the Most Catastrophic Crime in the History of Civilization.

But if U.S. Officials cannot lawfully decree mass murder to be liberty, then the United States is now being ruled by a giant conspiracy to mass murder - a conspiracy by the leading U.S. Officials to kill children in defiance of murder statutes.

America introduced civilization to the idea that reverence for life is the future for the world. Yet America is now ruled by the most corrupt decree which the human mind can even imagine - MASS MURDER IS LIBERTY. And government is reduced to the mere matter of which mass murderer can grab power, issue orders, and be blindly obeyed.

The U.S. Government knows how to make atomic bombs, but it does not know the difference between mass murder and liberty. This is the vision which America now holds out to guide the future of the world. Now we all descend into a terrifying darkness.

B.

Roe v. Wade Criminally Defied the Constitution's Guarantee of Life to "Any Person" Because the Court Defied the Rulings of John Marshall and Used a "Guilty Until Proven Innocent" Burden of Proof to Imply that the Words "Any Person" Do Not Include the Unborn.

The Court used the correct burden of proof when it previously construed these universal words "any person."[39] Yet in *Roe* v. *Wade*, the Court actually reversed the burdens.

1.

Chief Justice John Marshall explained what the Court must prove in order to imply an exception to express and universal terms in the U.S. Constitution.

As already described, the words "any person" are express and universal, and on their face include the unborn, the same as everybody else. In order to imply an exception to exclude the unborn from the universal guarantee of life, so they can be killed with impunity from criminal laws, the Court must prove that including the unborn within the terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[40]

And the Court must prove that if the right to life of the unborn had "been suggested [to the framers] the language would have been so varied, as to exclude it."[41] The Court must prove that the framers would have changed the Fourteenth Amendment to read: "Nor shall any State deprive any person, **except unborn persons**, of life without due process of law."

These are the burdens which protect the lives of all Americans from government sanctioned extermination, as happened in Hitler's Germany, or Stalin's Russia. Obviously, the Court must bear the heaviest burden of proof in order to imply an exception to the Constitution's guarantee of life to "any person" so millions of victims can be killed with impunity from criminal statutes.

Under Chief Justice Marshall's rules, the Constitution's guarantee of life to "any person" does include the unborn because "all mankind" would not unite "without hesitation" to exclude the unborn. And the framers of the Fourteenth Amendment would not have changed its guarantee of life to read "any person - except the unborn." The framers and adopters had already enacted criminal statutes to protect the lives of the unborn throughout gestation, and some abortions were murder. Thus there is no doubt that this universal guarantee of life to "any person" does include the unborn.

2.

But in *Roe v. Wade* the Court exactly reversed the burdens of proof described by Chief Justice John Marshall. The Court said that the evidence did not prove "with any ***assurance***"[42] that the guarantee of life to "any person" included the unborn. Assurance means "To make certain and put beyond doubt."[43] Thus the Court assumed that the words "any person" did not include the unborn, and then placed the burden on the unborn to prove with "assurance," to prove beyond doubt that the words "any person" did include the unborn.

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[39] The Court ruled the words "any person" included Chinese aliens ("subjects of the emperor of China") merely saying the words are "universal." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886).

And the Court was so sure that the words "any person" included "corporations" it refused to allow counsel to argue against it. *Santa Clara* v. *So. Pac. RR*, 118 U.S. 394, 396 (1886).

[40] *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202-203 (1819). When the Constitution uses universal words, and a case is "within the very words of the Constitution," the Court may not infer an exception unless the "absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

[41] *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644-45 (1819). When the Constitution uses universal words, " It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception."

[42] *Roe* v. *Wade*, 410 U.S. at 157. (emphasis added).

[43] *Black's Law Dictionary* (4th ed. 1968).

When courts use this burden of proof to condemn tens of millions of victims to death, Americans can not pretend they still have a government of Constitution and laws.

The Court claims it can use this burden of proof to decree the extermination of anyone to be liberty.

C.

Roe v. Wade Criminally Defied the Constitution's Guarantee of Life to "Any Person" Because The Court Used Criminal Procedures to Conclude that the Words "Any Person" Do Not Include the Unborn.

Roe v. Wade was a mock trial designed to exclude truth.

And the Court maintains its killings with mock trials. It refuses to allow counsel to represent the unborn and defend their right to life. It refuses to allow its false evidence in *Roe v. Wade*, which it used to imply that the words "any person" did not include the unborn, to be confronted and cross-examined. It refuses to allow evidence to be presented to show the Constitution's guarantee of life to "any person" does include the unborn.[44]

D.

Roe v. *Wade* Criminally Defied the Constitution's Guarantee of Life to "Any Person" Because the Court Fabricated False Evidence to Conclude that the Words "Any Person" Do Not Include the Unborn.

The history of the criminal abortion statutes proves that the framers of the Fourteenth Amendment did not intend its guarantee of life to "any person" to exclude the unborn.

When the Amendment was adopted in 1868, over three-fourths of the ratifying States had already enacted statutes

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[44] The *Motion to Allow Counsel to Represent Children Unborn and Born Alive* (filed in this case, and incorporated by reference) describes the Court's procedures.

which made abortion at any stage of gestation a crime.[45] Within a few years, these criminal statutes were universal.

The ancient common law supposed that life commenced at "quickening" - when the mother felt the child stir in her womb. But judicial revision makes it impossible for the Court to assert with assurance that the common law in 1868 was any different than the abortion statutes supplanting it. As one Court observed:

> By the ancient common law...as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of gestation.[46]

By 1868, medical science had long rejected the ancient notion that life commenced at "quickening." The abortion statutes reflected the views of medical science that there was

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[45] The statutes are set out in Quay, *Justifiable Abortion, Medical and Legal Foundations*, 49 Geo. L. J. 447-520 (1961).

[46] *Lamb* v. *State*, 67 Md. 524 (1887). Some state supreme courts ruled that the common law made abortion at any stage of gestation a crime. *Mills* v. *Comm.*, 13 Pa. 631 (1850); *State* v. *Slagle*, 83 N.C. 544 (1880); *State* v. *Reed*, 45 Ark. 333 (1885). And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately overruled by their legislatures which made abortion at any stage of pregnancy a crime. *Comm.* v. *Parker*, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). *State* v. *Cooper*, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). *Abrahams* v. *Foshee*, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

no time during gestation when the unborn were not alive.

In view of this history, the Court cannot meet its heavy burden to prove that the framers intended to exclude the unborn from the Fourteenth Amendment's guarantee of life to "any person," so they could be killed for convenience. This evidence is fatal to *Roe* v. *Wade*.

Thus the Court needed to rewrite 19th century medicine and law. The Court fabricated the hypothesis that the 19th century abortion statutes were intended to protect only the mothers, not the unborn. This suggested that the American people never intended the lives of the unborn to be protected by law. This hypothesis was fabricated as follows.

1.

The Court first asserted as fact, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." *Roe* v. *Wade*, 410 U.S. at 148. The Court claimed that abortions, even by physicians, were hazardous to the woman.

The only authority the Court cited to prove its assertion was a 20th century medical history book.[47] But this book only described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The abortion operation was not mentioned anywhere in the entire book.

The 19th century obstetric authorities throughout the Western world prove that abortions by physicians were "perfectly safe" to the woman.[48] The Court did not examine

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[47] Haagensen and Lloyd, *A Hundred Years of Medicine* 19 (1943), cited in *Roe v Wade*, 410 U.S. at 148 n.43.

[48] 2 T. Denman, M.D., *An Introduction to the Practice of Midwifery* 96 (1802). He was a standard English authority. A French physician wrote "experience has proved that the dangers of the operation are reduced to a small matter." A.L.M. Velpeau, M.D., *A Complete Treatise on Midwifery* 530 (4th Am. ed. 1852). The preeminent American physician wrote "to the mother there is very little danger." H.L. Hodge, M.D., *The*

even one of these obstetric textbooks. They prove the Court's assertion of fact, "the procedure was a hazardous one for the woman," to be false.

The Court never revealed the hazardous abortion procedure to which it was referring. Actually, the 19th century physicians generally used the ancient method,[49] which one physician traced back 2000 years,[50] and which they described as "perfectly safe" to the woman.

Since abortions by physicians were not hazardous to the mother, the only motivating purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortions. Had it been the purpose of the legislators to only protect the mother, they would have simply required abortions to be performed by physicians.

2.

The Court next asserted as fact, "Abortion mortality was high."[51] The Court cited no authority to support it.

The Court intended this assertion to prove that physicians were killing so many women with abortions that women needed legislation to protect them from the medical profession.

The 19th century obstetric authorities prove this assertion to be false. The obstetric texts show that abortions by physicians were "perfectly safe" to women.

Principles and Practice of Obstetrics 293 (1864).

[49] Dr. Denman, a standard authority in England, wrote in 1802: 'the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb, which was "perfectly safe" to the woman. 2 T. Denman, *An Introduction to the Practice of Midwifery* 96-99 (1802).

[50] F. Ramsbotham, M.D., *The Principles and Practice of Obstetric Medicine* 724 (4th ed. 1856).

[51] *Roe* v. *Wade*, 410 U.S. at 149.

3.

The Court next asserted the conclusion it derived from these two false assertions of fact:

> "[A] State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." *Roe v. Wade*, 410 U.S. at 149.

This is a false inference, drawn from two false assertions of fact.

The evidence shows these abortion statutes were intended to protect the unborn. The 19th century treatises on criminal law stated that the foetus was "a living being immediately after conception" and these abortion statutes were intended to protect the lives of the unborn during all stages of gestation.[52] And State supreme courts ruled that these abortion statutes protected the lives of the unborn.[53] And authors of the statutes said their purpose was to protect the unborn.[54]

An 1860 study by the American Medical Association contrasted the striking difference between safe abortions by physicians, and lethal abortions by criminals:

> "In thirty-four cases of criminal abortion ... twenty-two were followed... by death, and only twelve were not. In fifteen cases necessarily induced by physicians, not one was fatal." H.R. Storer, M.D., *On Criminal Abortion in America* 43 (1860).

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[52] 1 F. Wharton, *A Treatise on the Criminal Law of the United States* 656-57 (5th ed. 1861).

[53] *Smith* v. *State*, 33 Me 48 (1851).

[54] See quotes, *infra* pages 23-24, of Joynes, who authored the Virginia statute, and of the AMA, which proffered a model statute to the States.

Since abortions by physicians were known all over the western world to be safe to women, the motivating purpose of these abortion statutes could only have been to protect the lives of unborn children from destruction by abortions. Since legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals, it proves that their motivating concern was to protect unborn life.

4.

The Court then concluded, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe* v. *Wade*, 410 U.S. at 158.

The Court could not find even one 19th century authority to support this result.

In view of these abortion statutes, the Court cannot prove that the people who framed and adopted the Fourteenth Amendment intended its guarantee of life to "any person" to exclude the unborn, so they could be killed for convenience.

5.

The Court resurrected the ancient view that life commenced at "quickening" (about four months gestation) and arbitrarily expanded that to "viability" (about seven months gestation). Yet, by the time the Fourteenth Amendment was adopted, both science and law had rejected the ancient view.

A physician, who helped draft Virginia's 1848 state abortion statute, explained that science had rejected the ancient view that life began at quickening:

> "(T)hat the embryo is endowed with an inherent vitality from the first moment of conception, and is therefore as much entitled to the protection of the law before the period of "quickening" as after it, every well-informed physician must yield a ready assent. The old doctrine, once held by medical men...that the foetus first becomes

animated, or endowed with distinct vitality, at the moment when the sensation of quickening is experienced by the mother, has been long since banished from the domain of science ... and now only finds a retreat in the dark and ancient caverns of common law...."

"(T)he civil rights of the unborn child are perfect from the very commencement of its being."

L.S. Joynes, M.D, "Foetus in Utero," *Virginia Medical Journal* 179-180, 187 (1856).

In 1860 the President of the American Medical Association condemned that ancient view as a "barbarous physiology" and urged the States to enact statutes to protect all stages of unborn life:

"This relic of a barbarous physiology needs to be exploded, and the truth should be generally promulgated, that, from the moment of conception, a new being is engendered." 13 *Transactions of the American Medical Association* 56-7 (1860)

And America's eminent professor of obstetric medicine wrote in 1860:

From the moment of fecundation, the new being becomes independent...its individuality is complete....(T)here is a progressive...advancing from one degree of perfection to another. Every protection, therefore, which is extended by human legislation to the young infant...should be equally effectual in securing the life of the embryo from the earliest period of its existence.[55]

[55] H.L. Hodge, M.D., *The Principles and Practice of Obstetrics* 78 (1864). Hodge's "name had become a household word throughout the

But the Court adopted a view of unborn life which 19th century medical science had rejected as "a barbarous physiology," which courts had ruled "never ought to have been the law anywhere,"[56] and which legislatures had condemned as criminal.

In construing the phrase in its constitution, "Everybody has the right to life," the Supreme Court of West Germany ruled that the word "everybody" did include the unborn, and the State had a duty to protect unborn life: "No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life."

The medical and legal history show the framers and adopters of the Fourteenth Amendment made this same conclusion when they guaranteed life to "any person" without any exceptions for the unborn. They decided that unborn life was a progressive advancing from one degree of perfection to another, and there was no time when the unborn were not alive and the law could withdraw its protection of life.

Chief Justice Marshall ruled that the intention of the framers is the law, and for the Court to disobey it would be "treason to the Constitution." So the Constitution's guarantee of life to "any person" does include the unborn.

The Court claims that it can fabricate evidence to exclude anyone from the U.S. Constitution's guarantee of life to "any person." In effect, the Court claims FALSEHOOD IS TRUTH.

land" and his book "valued among the very first works on obstetrics ever issued from the American or foreign press." R. Penrose, M.D., *Discourse on Life of H.L. Hodge* 20-21 (1872).

[56] *Mills* v. *Comm.*, 13 Pa. at 632 (1850).

E.

Due Process of Law Has Compelled the U.S. Supreme Court to Confess in Court that it Is Guilty of Mass Murder and Extermination.

For the **123rd time**, the U.S. Supreme Court is accused of defying the Constitution's guarantee of life to "any person" and deliberately exterminating millions of victims whom the Constitution endeavors to preserve.

For the **99th time,** the U.S. Supreme Court is accused of mass murder in violation of state and federal criminal statutes.

For the **101st time**, the U.S. Supreme Court is accused of using criminal procedures to effect and maintain its *Roe v Wade* killings.

But, for three decades, the Court has never attempted to refute the charges.

Failure to deny a charge is admissible as a confession that the charge is true.[57]

At his trial for treason in 399 B.C., Socrates cross-examined one of his accusers: "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?"

And this Court recognizes this ancient rule:

> "(T)he Court has consistently recognized that...silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." *Baxter* v. *Palmigiano*, 425 U.S. at 319 (1976).

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[57] 4 Wigmore, *Evidence*, Sec. 1071-1073 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." *McCormick on Evidence*, Sec. 161 (1972).

Under the Court's own rulings, its silence is an admission that the charges are true:

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." *United States v. Hale*, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that the court's silence is a confession that the charges are true.

First, the evidence proves the charges to be true. The Court decreed killings to be "liberty" which States had defined to be "murder." This is mere historical fact. No denial is possible. As Chief Justice John Marshall wrote, "a fact which has existed cannot be made never to have existed."[58]

Second, the charges were made in court, the place designated by law to hear such accusations. The Judges had a legal duty to refute the charges, if they could. Chief Justice John Marshall ruled that judges who "close their eyes on the Constitution" and "condemn to death those victims whom the Constitution endeavors to preserve" commit "crime."[59] The Court had a legal duty to fully hear allegations that Roe v. Wade was wrongly decided, and to obey the evidence.

Third, the Court's steadfast silence for three decades in the face of scores of accusations is unparalleled in the legal history of the world. The Court itself cited this circumstance as making confession by silence more trustworthy:

> "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such

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[58] *Marbury* v. *Madison*, 1 Cranch 137, 167 (1803).

[59] *Marbury* v. *Madison*, 1 Cranch 137, 179-180 (1803).

circumstances that the accused would be more likely than not to dispute an untrue accusation." *United States* v. *Hale*, 422 U.S. 171, 176 (1975).

Fourth, the evidence showed the United States was being ruled by a giant conspiracy to exterminate and mass murder, to overthrow the U.S. Constitution, and to impose Nazi doctrines on America. Never in history had it ever been more imperative to deny charges if they were untrue.

And **fifth**, the Justices met the charges in court by claiming that they must be obeyed even if they decreed the mass murder of Jews, or anyone else, to be liberty.

A government of laws can permit only one conclusion to be drawn from these facts: the U.S. Supreme Court confessed that the charges are true.

III.

IF *ROE* v. *WADE* IS A MISTAKE OF LAW, THEN ALL PUBLIC OFFICIALS, OR CITIZENS, WHO SUPPORT IT MAY BE GUILTY OF COMPLICITY IN EXTERMINATION, INCLUDING MASS MURDER.

We now arrive at the most important legal question in world history: Can the U.S. Supreme Court lawfully decree national extermination and mass murder to be liberty? The U.S. Supreme Court claims that it can.

But if *Roe* v. *Wade* is a mistake of law, then all the government officials, news media persons or citizens who helped to support and maintain it may be guilty of complicity in national extermination, including mass murder.

The general rule is that mistake of law is no excuse for breaking the law.[60] The Constitution's *ex post facto* provisions

[60] R. Perkins, *Criminal Law* 920 (2d ed. 1969); Oliver Wendell Holmes, *The Common Law* 41 (Howe ed. 1963).

do not apply to judicial decisions which are a mistake of law.[61] The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply in homicide cases, much less national extermination and mass murder.[62] But even if it did, no reliance on *Roe v. Wade* could be reasonable in view of the above facts. So the law applied at Nuremberg applies here. Obedience to the decrees of the supreme judge is no defense to national extermination and mass murder.

Even if the U.S. Supreme Court held a gun to a man's head, and threatened death unless he obeyed *Roe v. Wade*, it would not be a defense to homicide. Blackstone stated the law: "(H)e ought rather to die himself than escape by the murder of an innocent."

In explaining why the Western democracies bowed to violence and the Nazis got away with monstrous crimes, Winston Churchill merely quoted Machiavelli: "Men avenge slight injuries, but not grave ones." Thus America is now ruled by a giant conspiracy to mass murder.

"Political language," wrote George Orwell, "is designed to make lies sound truthful and murder respectable." In his novel *1984*, Orwell described a tyranny which claimed, "Whatever the Party holds to be truth is truth," and defrauded its subjects into obedience with its slogans "FREEDOM IS SLAVERY" and "WAR IS PEACE."

This science fiction may appear implausible, yet for three decades the United States has been ruled by a Court which claims, "Whatever the Court holds to be truth is truth," and maintains obedience with its slogans- MASS MURDER IS

[61] *Ross* v. *Oregon*, 227 U.S. 150, 161 (1912).

[62] *Model Penal Code*, Section 2.04, Ignorance or Mistake (Proposed Official Draft 1962) and comments in the *Model Penal Code*, Tentative Draft No. 4, Comments on Sec. 2.04, page 138. R. Perkins, *Criminal Law* 928 (2d ed. 1969). A. Ernest, *Mass Murder is Liberty* 74-104 (1998)

LIBERTY, FALSEHOOD IS TRUTH, and TREASON IS LAW.

But all that will be swept away. The primitive idea, that some can gain by killing others, has no future. The message of our Declaration of Independence becomes more true every day - reverence for life is the only path to the future. Wherever we are, wherever in the universe our kind may go, our essential thought, the thought necessary for us to exist, will always be reverence for life.

CONCLUSION

Merely overruling *Roe* v. *Wade* will not remedy the wrong. The Court misguided this nation and the entire world. Now the Court must speak the obvious truth. The U.S. Constitution's guarantee of life to "any person" does include the unborn. State and federal governments have a duty to protect unborn life.

Alan Ernest,
Counsel

(22)

No. 04-1144

Supreme Court, U.S.
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In The

Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF AMICI CURIAE OF LOREN LEMAN, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, AND ALASKA LEGISLATORS IN SUPPORT OF PETITIONER

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MISCELLANEOUS:

Crutcher, Mark, *Child Predators* (2002) *available at* www.childpredators.com/Forms/Child Predators.pdf 19

Henshaw, Stanley K. & Kost, Kathryn, *Parental Involvement in Minors' Abortion Decisions*, Family Planning Perspectives, Sept.-Oct. 1992 21

Paul, et al., *A Clinician's Guide to Medical and Surgical Abortion* (Churchill Livingstone 1999) 11

Stedman's Medical Dictionary (Williams & Wilkins 26th ed. 1995) 10

INTEREST OF AMICI[1]

The Amici Curiae who present this brief to the Court include Alaska Lieutenant Governor Loren Leman and the following members of the Alaska Legislature: Senator Fred Dyson; Senator Lyda Green; Senator Ralph Seekins; Senator Gary Stevens; Senator Gary Wilken; Representative John Coghill; Representative Nancy Dahlstrom; Representative Carl Gatto; Representative Mike Kelly; Representative Vic Kohring; Representative Bob Lynn; Representative Mark Neuman; Representative Donald Olson; Representative Bill Stoltze; and Representative Peggy Wilson.

In 1997, then a member of the Alaska Senate, Alaska Lieutenant Governor Loren Leman was the principal sponsor of the Alaska Parental Consent Act ("the Act"). The Act, which requires that minor girls ages 16 and younger obtain either one parent's consent or a judge's approval before obtaining an abortion, is similar in many respects to New Hampshire's Parental Notification Prior to Abortion Act ("the N.H. Act"). On behalf of the State of Alaska, therefore, Lieutenant Governor Leman has a significant interest in the resolution of this case. The Alaska legislators who have placed their names on this brief either supported passage of the Act in 1997 or support its enforcement at this time.

In *Planned Parenthood of Alaska v. State*, Case No. 3AN-97-6014 Civ., the State of Alaska defended the Act from constitutional challenge under various provisions of

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. The North Star Civil Rights Defense Association, Inc., an Alaska nonprofit corporation, made a monetary contribution to the preparation and submission of this brief.

the Alaska Constitution. During a three-week bench trial conducted in Alaska Superior Court in January 2003, the State introduced substantial evidence in support of the Act, and in doing so built upon the evidentiary foundation laid in prior cases litigated in separate states regarding state constitutional challenges to other parental involvement acts. The Alaska Superior Court evidentiary record is the most recent and extensive record developed regarding the justifications for, and the impacts of, parental involvement laws like the Alaska and New Hampshire Acts. Lieutenant Governor Leman and the Alaska legislators summarize and present the Alaska Superior Court record to the Court in this brief because they believe that it will assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Parental involvement laws are in the best interests of minor girls and their families. Parental involvement laws do not harm minor girls. Rather, these laws protect minor girls from their own immaturity, provide necessary adult assistance with respect to the giving of informed consent, and protect the physical, psychological and emotional health of minor girls.

In almost all cases, adolescent girls do not plan their pregnancies, are shocked by the news that they are pregnant, and consider the resulting situation to be a crisis. Pregnant minor girls need adult guidance in dealing with crisis pregnancies. The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of abortion are not necessarily related. Minor girls as young as 10 or 11 can become pregnant.

Minors have a greater tendency to engage in avoidance and denial when dealing with bad situations, including pregnancy and abortion. Because adolescents typically want to avoid and escape from problems, abortion is a very seductive choice for a pregnant adolescent. If minors are not encouraged to inform and involve their parents in their pregnancy and abortion plans, and are given an option, they will most typically elect to not involve their parents in their abortion plans. Even in loving, functional families, minor girls often need encouragement to consult their parents regarding pregnancy and abortion. Minor girls often misapprehend their parents' probable reaction to their unplanned pregnancies, unreasonably expecting an overly negative reaction. Left to their own juvenile devices, most adolescent girls do not seek suitable adult advice regarding abortion and they often succumb to pressure and power differentials. Most often, when a parent is not involved in a young girl's abortion plans, a boyfriend is involved. Two-thirds of the time the boyfriend is an adult sex-offender.

Minors typically do not have experience in navigating the healthcare system and in choosing qualified and safe physicians, who will adequately explain the abortion procedure and possible complications when obtaining informed consent. Parents, when aware of their daughter's abortion, are more able to monitor their daughter for physical and psychological complications and assure her adequate follow-up treatment. On their own, minors tend to be unreliable at following medical instructions. With parental assistance, a minor's compliance with medical instructions and treatment plans and, thus, their safety increase greatly.

Parental involvement laws help protect young girls from sexual abuse and help catch adult male sex offenders. When a girl age 16 or younger is pregnant there is a two-thirds

chance that she has been sexually assaulted by a male 6-7 years older. Boyfriends push young girls toward abortion to avoid legal obligations, either criminal or financial. A parent or a judge would be very likely to discover and report sexual abuse when a minor girl approaches them for consent to an abortion. By contrast, abortion providers are unreliable in reporting sex abuse. Ending sexual abuse is always in a minor girl's best interests. Parental involvement or judicial consent helps to ensure that a minor girl will not be pressured into an abortion by a boyfriend, typically an older adult male, who is selfishly seeking to avoid criminal or financial responsibility.

Parental involvement laws encourage but do not ultimately require young girls to consult their parents regarding abortion. In states with parental involvement laws, the percentage of girls involving their parents in their abortion plans has significantly increased after enactment of the laws even though judicial bypass is available. Parental involvement laws are in the best interests of both minor girls and their families because they have the effect of fostering and protecting the family structure. A parent's right to custody, control and management of a minor child is a fundamental liberty interest protected by the United States Constitution.[2] As the United States Court of Appeals for the Fourth Circuit has explained, this fundamental right "is at its zenith when the decision as to which parental involvement is urged is one – like the abortion decision – with profound and enduring consequences not merely for the physical well-being of the child, but for the child's spiritual, moral, and

[2] *Troxel v. Granville*, 530 U.S. 57, 65-66, 68 (2000).

emotional development."[3] This Court should uphold the N.H. Act.

ARGUMENT

I. PARENTAL INVOLVEMENT LAWS EFFECTIVELY SERVE TO PROTECT MINOR GIRLS FROM THEIR OWN IMMATURITY.

Experience makes an enormous difference in improving the quality of adolescent decision making. Thus, chronological age distinctions are extremely significant because experience is acquired over time. Lack of experience affects a minor girl's ability to make decisions regarding abortion. [App. 119a-123a][4] Minors tend to base decisions upon misperceptions and misunderstandings. [App. 189a-190a, 191a-192a] The typical minor will misapprehend her

[3] *Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 362, 368 (4th Cir. 1998).

[4] Citations to "App. ___a" are to pages of the official transcript of the trial in *Planned Parenthood of Alaska v. State of Alaska*, Case No. 3AN-97-6014 (Alaska Super. Ct. 2003) which have been reproduced in Appendix A. Amici have reproduced portions of the trial transcript in Appendix A of this brief and for the Court's convenience have replaced the original transcript page numbers with appendix numbering. Citations to "App. ___b" are to pages contained within the transcripts of depositions taken in *Planned Parenthood of Alaska v. State of Alaska*, Case No. 3AN-97-6014 (Alaska Super. Ct. 2003). The deposition transcripts cited were entered into evidence and comprise part of the record in *Planned Parenthood of Alaska v. State of Alaska*, Case No. 3AN-97-6014 (Alaska Super. Ct. 2003). Citations to "App. ___c" are to pages in the official trial transcript of *N. Fla. Women's Health & Counseling Servs, Inc. v. Florida*, Case No. 99-3202 (Fla. Cir. Ct. 1999). The portions of the Florida trial transcript cited were entered into evidence and comprise part of the record in *Planned Parenthood of Alaska v. State of Alaska*, Case No. 3AN-97-6014 (Alaska Super. Ct. 2003).

parents' probable reaction to her unplanned pregnancy, unreasonably expecting an overly negative reaction. [App. 6a-8a, 36a-41a][5] The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of abortion are not necessarily related. [App. 110a-111a, 175a-180a] Minor girls as young as 10 and 11 can and do become pregnant.[6] [App. 158a]

In almost all cases, adolescent girls do not plan their pregnancies, are shocked by the news that they are pregnant, and consider the resulting situation to be a crisis. [App. 105a-108a] Minors have a greater tendency than adults to engage in avoidance and denial when dealing with bad situations, including pregnancy and abortion. [App. 2b-4b] Because adolescents typically want to avoid and escape from problems, abortion is a very seductive choice for a pregnant adolescent girl. [App. 119a-123a] Studies reflect that if minor girls are not encouraged to

[5] The great majority of parents (a) are supportive of their minor daughters when they are faced with an unplanned pregnancy and contemplating an abortion; and (b) will assist their daughters in making informed and intelligent decisions regarding abortion. [App. 6a-8a, 36a-41a, 175a-180a] Most parents tend to support their daughter's decision when they are informed before her abortion but are more likely to be angry or disappointed if they find out about the abortion only after the event. [App. 22a-24a]

[6] Some abortion providers recognize the existence of this gap between fertility and maturity and take measures to accommodate it. For example, 1993 Alaska ACLU Citizen of the Year Dr. Susan Lemagie, who is the Medical Director of Planned Parenthood of Alaska, believes that girls up to the age of 15 need adult involvement in their medical decision making. [App. 4a] Dr. Lemagie also admitted that she does not provide "medical abortions" (*i.e.*, non-surgical abortions) to girls ages 16 and under because she does not believe that girls in this age range can handle the process without parental or other adult supervision. [App. 4a-5a] Dr. Lemagie believes that parental involvement in abortion is an excellent idea for adolescent girls. [App. 3a-4a, 5a-6a]

inform their parents of their pregnancy and abortion plans and are given an option, they will elect to not involve their parents in their abortion plans. [App. 7b-8b] Minors tend to delay responding to an unplanned pregnancy because of their (1) inexperience in recognizing the symptoms of pregnancy, (2) reluctance to accept the reality of their situation, (3) lack of knowledge of where to seek advice, and (4) hesitation to confide in adults. [App. 28a-31a, 70a-75a][7]

Minors do not process information in the same way as adults. [App. 109a-110a] Minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences. [App. 8b-14b][8] Minors have a propensity to make decisions based upon emotions rather than information and logic. They are unlikely to think things through cognitively and are not typically capable of analyzing multiple variables in their decision making. Adolescence is a period of fluctuating

[7] Minors often delay their abortion decision because of their immature characteristics and their lack of experience, the combination of which often leads to denial. [App. 28a-31a, 75a-76a] Because they do not know where to seek appropriate advice and hesitate to confide in their parents, girls often turn to their boyfriends. "Power differentials" exist between minor girls and their older male boyfriends, and vulnerable pregnant adolescent girls often succumb to their older boyfriend's wishes regarding abortion. [App. 1c-3c] An adolescent girl's pregnancy is a sign of her vulnerability and is a reflection of developmental failure in her decision making. [App. 112a-117a]

[8] Adolescents often resist things which are good for them and require parental assistance in order to make good decisions. [App. 112a-117a] A minor's failure to take into account both immediate and long-range consequences in their decision making is particularly evident in the emotionally charged context of abortion. [App. 175a-180a; 8b-14b]

emotions and intellectual abilities. [App. 119a-123a][9] Placing minors in positions where they are required to make adult decisions puts enormous emotional pressure and stress upon them, thus making them more susceptible to immature, self-conscious and risk-taking behaviors. [App. 8b-14b][10]

Minors' brains are underdeveloped and under construction, with brain development continuing through age 20. [App. 111a-112a] The underdevelopment of minors' brains detrimentally affects the quality of their decision making and thereby diminishes the ability of a minor acting alone to bring mature insight and judgment into the abortion decision-making process. [App. 112a-117a]

II. PARENTAL INVOLVEMENT LAWS EFFECTIVELY SERVE TO PROTECT THE PHYSICAL, EMOTIONAL, AND PSYCHOLOGICAL HEALTH OF MINOR GIRLS.

The physical, emotional, and psychological consequences of abortion are serious and can be lasting, particularly when

[9] It is very typical for adolescents to want independence ("leave me alone") but at the same time to very much want parental guidance. [App. 112a-117a] Abandoning adolescents completely to their own decision making is most often frightening to them. [App. 119a-123a]

[10] Minors tend to be more impulsive in their decision making. [App. 70a-75a] They tend to think of themselves as being "center stage," with everyone watching them, and their decision making tends to be dominated by this type of self-conscious thinking. Minors also tend not to think of themselves in terms of negative effects, believing that although bad things happen to other people, bad things will not happen to them. All of this immature thinking leads minors to be very susceptible to peer pressure, pressure from others, and higher levels of risk taking. [App. 8b-14b] Minors are often unable to correctly interpret their environment, and thus they have difficulty planning appropriate responses. [App. 109a-110a]

the patient is young and immature. [App. 43a-52a] The short-term health risks of abortion are bleeding, infection, damage to internal organs, retained products of conception (*i.e.*, incomplete abortion), anesthesia-related complications, and death. [App. 43a-52a, 164a-167a, 167a-175a] The long-term health risks of abortion include fetal loss related to pre-term babies, low birth-weight babies, placenta previa, sterility or loss of fertility, and an increased risk of breast cancer. [App. 43a-52a][11] No less real than the physical consequences are the emotional or psychological health risks of abortion which include depression, post-traumatic stress, suicidal ideation, psychiatric admissions, and substance abuse. [App. 43a-52a, 61a-66a, 118a-119a][12]

[11] An early full term pregnancy will reduce a woman's risk of breast cancer later in life. [App. 52a-53a, 56a-57a] A minor girl who aborts her pregnancy and thus does not carry her pregnancy to term, increases her risk of developing breast cancer later in life. [App. 43a-52a, 56a-57a] This increased risk of breast cancer is exacerbated if the girl has a family history of breast cancer. [*Id.*; 1b-2b] Minors are most often unaware of a history of breast cancer in their extended family and a parent, particularly a mother, is more likely to be aware of a family history of breast cancer and to factor this information into [illegible] abortion decision. [App. 36a-41a]

[12] The suicide rate for women is six times greater among those who have had abortions. [App. 55a-56a] The 1998 Soderberg study of 854 women who had undergone induced abortions, revealed that 50-60% had "experienced some measure of emotional distress, classified as severe in 30% of the cases." [App. 1c-3c] In acknowledgment of this risk, Dr. Lemagie refers 100% of her abortion patients to counseling. [App. 8a-11a]. Minor girls are at greater risk than adult women for emotional and mental effects after abortion. [App. 42a-43a, 112a-117a] Women who have later term abortions have a greater chance of negative emotional responses. [App. 42a-43a] Minors tend to delay their abortion decisions. [App. 28a-31a, 75a-76a] Sixty percent (60%) of girls under fifteen years old wait until after eight weeks gestation before seeking abortion advice, and 25% wait until after twelve weeks. [App. 14a-15a]

The abortion process itself presents serious health risks for the young girl that warrant parental involvement. [App. 155a-158a] First trimester abortion procedures for girls ages 16 and younger require two days. [App. 81a-82a] On the first day, the girl meets with a staff member who obtains a medical history and provides abortion counseling.[13] The girl then meets with a nurse mid-wife, who obtains her consent and inserts the Laminaria[14] into her cervix. [App. 83a-84a, 85a-86a, 86a-87a] The young girl does not meet with the doctor that day but rather must go home with the Laminaria inserted and return to the clinic the following day for the actual abortion procedure. If the girl fails to return the following day to have the Laminaria removed, she can suffer severe complications including infection, sterility, loss of the uterus/ovaries, and death. [App. 92a-95a, 155a-158a][15]

Minors are notoriously unreliable in following medical care instructions, and thus, the risks inherent in abortion are compounded for minor girls. However, minors' compliance in following medical treatment plans greatly increases when they have the assistance of a parent. [App. 55a, 98a-105a, 108a-109a, 155a-158a] Moreover, even if

[13] Abortion providers typically do not have adequately trained staff members for purposes of counseling minor girls regarding abortion. [App. 118a-119a]

[14] The Laminaria is a "sterile rod made of kelp which is hydrophilic, and, when placed in the cervix canal, absorbs moisture, swells, and gradually dilates the cervix." *Stedman's Medical Dictionary* p. 934 (Williams & Wilkins 26th ed. 1995); [App. 81a-82a]

[15] Insertion of the Laminaria introduces a pathway for infection to travel from the vagina to the uterus. [App. 84a-85a] Once infection "seeds," a mere 4-8 hours of the infection growing and spreading is very serious. [App. 164a-167a]

the girl would follow the medical instructions on her own, unaware parents could plan travel or other family engagements that conflict with the young girl's necessary return visit to the abortion clinic. [App. 92a-95a]

The safety of minor girls also depends upon the selection of a competent and experienced abortion provider. Most girls have no experience in evaluating and selecting a physician. Thus, they frequently need parental or adult assistance in selecting a competent and experienced provider. [App. 42a-43a, 70a-75a, 155a-158a] Selection of an abortion provider is an important decision because doctors performing abortions vary in skill, experience, and procedure.[16] Minor girls demonstrate their inexperience and difficulty in selecting an abortion provider when they select doctors who do not provide adequate counseling or screen individuals for ability to understand the procedure and give informed consent.[17]

[16] There is a major difference of opinion regarding proper abortion procedure. One school of thought and practice believes that performing D&E abortions without using ultrasound to check for complete removal of the fetal tissue is unsafe [App. 70a-75a], while the other does not believe it necessary to use the safeguard of an ultrasound in performing a D&E abortion procedure. [App. 70a-75a] D&E, which stands for dilation and evacuation, is the abortion procedure used most prevalently after 12 weeks gestation, and involves (a) dilation of the cervix using a Laminaria and then (b) the evacuation of the uterus by suction via the use of vacuum aspiration and/or by grasping and removing fetal parts via the use of forceps. Paul, et al., *A Clinician's Guide to Medical and Surgical Abortion*, Ch. 10, pp. 123, 125, 131-136 (Churchill Livingstone, 1999).

[17] A parent is unlikely to select a doctor who approves patients uniformly for a procedure without regard to the patient's particular circumstances or cognitive abilities. Though the ability to give informed consent is not merely a function of age, it is unthinkable that a competent doctor, who spends his career performing abortions on both women

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Parental involvement laws provide for necessary adult assistance in giving informed consent. An unaccompanied minor is not as able as a typical adult woman to understand the risks of abortion and make an informed, intelligent decision about whether to undergo the procedure. [App. 117a-118a][18] Most minor girls do not have the brain, intellectual, and emotional development required to enable them to give informed consent to a serious medical procedure like abortion without assistance from a parent or guardian. Minors' natural immature, self-conscious, and overly positive thought processes lead them to be susceptible to pressure from others and risk-taking, which is detrimental to informed, intelligent decision making. [App. 105a-108a, 117a-118a; 8b-14b]

The physician or nurse mid-wife performing the abortion does not serve as an adequate substitute for a loving, involved parent in assisting a girl to understand and consent to the procedure.[19] Family is the best support

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and girls as young as 12, could never have met a single minor patient incapable of giving truly informed consent. Some doctors' habits of uniformly accepting the consent of minor girls for abortion reflect a belief that fertility, rather than age or intellectual and emotional maturity, equals ability to give informed consent. [App. 64a, 72a-74a]

[18] Some girls ages 16 and under cannot independently give informed consent to pregnancy related medical procedures. [App. 67a-69a] No medical studies show that girls 16 and under are capable of giving informed consent. Having parents involved in obtaining informed consent for minor girls is advisable. [*Id.*] A supportive parent is extremely helpful in managing a young girl's pregnancy and doctors sometimes need to call upon parents to help convince a young girl to follow sound medical advice. [App. 69a-70a, 57a-58a]

[19] Generally, girls do not obtain abortions from doctors with whom they have a prior relationship. [App. 53a-55a] The doctor chosen does not know the girl nor does the doctor or nurse spend enough time with her to be able to give adequately individualized information and

(Continued on following page)

for a young girl choosing whether to undergo an abortion. [App. 58a-60a, 175a-180a][20]

Minor girls also need the help of an adult in safely dealing with post-abortion complications. Following an abortion, a young girl needs to be monitored for anesthesia-related complications, heavy or prolonged bleeding, infections, fever, uterine or colon perforation, and emotional and psychological effects. [App. 43a-52a, 154a-167a][21]

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support to each unique girl. The average abortion provider cannot adequately assess the minor girl, her emotional and physical state, her medical and emotional history, and obtain an informed consent from her for the abortion procedure in the few short minutes he spends with her. Five to seven minutes with a doctor is no substitute for a parent who for many years has sought what is in the best interests of a daughter. [App. 53a-55a, 85a-87a] Minors simply do not know how to negotiate the healthcare system alone because they lack that particular life experience. [App. 189a-190a] Most minors, especially when in a state of crisis, cannot reasonably be expected to digest and understand the informed consent forms which physicians present to them for signing prior to performing an abortion. [App. 36a-41a, 98a-108a, 117a-118a] The great majority of parents are beneficial in helping their minor daughters to consider all of the risks and benefits associated with abortion and other options available in responding to an unplanned pregnancy and to give informed consent to the abortion procedure. [App. 36a-41a, 97a-98a, 138a-143a, 175a-180a]

[20] Most parents, when informed of a young daughter's pregnancy, support her abortion decision. [App. 175a-180a] When parents share responsibility for the abortion decision with their daughter, they relieve the young girl of unnecessary and unhealthy stress and guilt. [*Id.*] The adequacy of the doctor-patient relationship is negatively affected by the young age of a minor patient and is positively affected by an involved parent. [App. 46a-86a] A study conducted by Dr. Stanley Henshaw reveals that a significant percentage of the young girls who completed a questionnaire for abortion clinics *prior to the abortion procedure*, reported that they were being forced to have an abortion *but, nonetheless*, were provided abortions by the clinic. [App. 20a-22a]

[21] Because they have an immature cervix and because they delay their abortion decisions, girls 16 years and younger are more likely

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A young girl is much more likely to receive timely and adequate post-abortion medical observation and care if her parent(s) are aware of her pregnancy and abortion. [App. 66a-67a, 155a-158a, 160a-163a, 167a-175a] Without parental involvement, minor girls tend to delay seeking medical care for abortion complications. Abortion providers tell girls that they will experience some degree of pain and bleeding, so when they experience pain and bleeding following the abortion they tend to think things are fine. Young girls tend to not recognize as quickly on their own when their pain is too great, their bleeding too prolonged or too heavy, and that they need medical attention. [*Id.*]

Minors want the abortion experience to end; thus, they often deny that they are experiencing problems. [App. 160a, 160a-163a, 167a-175a] Having not informed their parents of their pregnancy and abortion, many times the

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than older females to have post-abortion complications. [App. 4b-8b] Furthermore, parents cannot adequately monitor a daughter for depression and suicide risks if they are unaware of her abortion. Minors are at greater risk to experience negative emotional or psychological health consequences from abortion than adult women. A minor who keeps her abortion secret from her parents or guardian is more likely to suffer negative emotional and psychological health responses after her abortion. [App. 119a-123a, 123a-126a, 175a-180a] Minors who keep secrets from their parents about important issues in their lives tend to be more depressed and experience more emotional pain. Secrecy is not healthy between a minor and parents and causes the minor excess anxiety. [App. 119a-123a, 123a-126a, 175a-180a] The emotional and psychological health risks associated with having an abortion can often be long-lasting. [App. 61a-66a] A minor who has an abortion with the knowledge and support of her parents or guardian is more likely to be healthy emotionally and psychologically in the years immediately following her abortion and later in her life. [App. 118a-119a, 123a-126a] Informed parents are generally in the best position to provide long-term emotional support to a minor after an abortion. [App. 4b-8b]

girls also try to hide the symptoms of abortion complications from their parents. [App. 4b-8b] All of these factors lead to delayed medical care for the minor girl to treat her abortion complications. [App. 160a, 160a-163a, 167a-175a]

Outside of an emergency, physicians must obtain parental consent to treat a minor girl for an abortion complication. [App. 55a-56a] By treating them the same as adults and leaving the post-abortion care up to the minor, abortion providers do not take adequate steps to ensure that minor girls receive necessary post-abortion care. [App. 95a-96a] These girls are responsible for following an antibiotic regimen in order to fend off infection. [App. 96a-97a] Only 30% of women, including adults, return to the abortion provider for follow-up care. [App. 28a-31a, 55a] When a minor girl does not inform her parents about her abortion, delay in seeking post-abortion complication care occurs in 80-90% of the cases, and the average resulting delay is anywhere from six to twelve hours. [App. 160a-163a, 167a-175a]

Abortion complications can become very serious very quickly. [App. 164a-175a] Death can result if infection is allowed to grow and spread through the uterine cavity and then outside the fallopian tubes and into the blood stream. Sterility can result if the infection is allowed to last and scar the fallopian tubes. Prolonged bleeding can result in under-perfusion of the organs, including brain, heart, and kidneys, which can lead to negative consequences up to and including death. *Id.* Complications related to bleeding or infection can become very serious in a mere four to eight hours. Uterine perforation with colon perforation causes infection to grow and spread much more quickly because so much bacteria is introduced into the abdominal cavity. *Id.* Excessive bleeding can result simply from the

scraping of the uterus wall during the abortion procedure and, thereafter, a lack of constriction of the uterus and blood clotting. In the case of heavy bleeding, even four hours of delay can be disastrous for the young girl. *Id.*

In the great majority of cases, parents or guardians are in a better position than a minor acting alone to monitor for adverse emotional or psychological consequences following an abortion. However, parents or guardians cannot adequately monitor the minor for such consequences if they are not made aware of the abortion. [App. 119a-123a, 125a-126a]

When parents are involved in a young girl's post-abortion care, the girl comes earlier to seek medical care for complications. [App. 70a-76a] Parents who are aware of the abortion can watch the girl's physical condition for symptoms and help piece symptoms together to recognize a serious medical problem more quickly. Some symptoms of abortion complications are internal and some are subtle, recognizable only by their severity, like excessive pain, excessive or prolonged bleeding, and high fever. Timely medical treatment for abortion complications cuts down on the severity of the complications. [App. 160a-163a, 167a-175a]

When parents are aware of their daughter's abortion prior to bringing her to the emergency room for care related to an abortion complication, they are more quickly and accurately able to inform the hospital personnel what their daughter's health problem is and to focus on getting her the medical care she needs. Emergency room staffs can better serve a girl experiencing an abortion complication when they learn of the abortion quickly from informed

parents, do not have to discover the abortion for themselves through medical tests and analysis, and do not have to deal with shocked parents upon learning for the first time of the abortion. [App. 160a-163a] The great majority of parents who learn of their minor daughter's abortion are involved and beneficially supportive in helping the minor receive post-abortion medical care, including care related to abortion complications. [App. 160a-163a, 167a-175a]

III. PARENTAL INVOLVEMENT LAWS HELP PROTECT YOUNG GIRLS FROM SEXUAL ABUSE AND HELP CATCH ADULT MALE SEX OFFENDERS.

A substantial number of pregnant minor girls have been impregnated by men whose ages make them guilty of sexual abuse of a minor. These men are typically an average of between 6-7 years older than the minor girl. [App. 143a-151a, 151a-152a][22] Stopping the sexual abuse of a minor girl is always in her best interests. [App. 123a-125a]

Parental involvement laws reasonably help to facilitate the discovery and reporting of physical abuse and sexual assault against minors. [App. 193a-196a] A parent/guardian is more likely to discover and report physical

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[22] In his study regarding minor girls and abortion decision-making, Dr. Henshaw, who regularly testifies for Planned Parenthood in abortion litigation, possessed information regarding how many of the impregnating boyfriends were over the age of twenty-one but chose not to report the data. [App. 24a-28a] Dr. Henshaw does not believe that prosecution of statutory rape is particularly beneficial to a minor girl. [*Id.*]

and/or sexual assault against their minor daughter or ward if they are aware of and involved in her pregnancy and abortion decision-making. [*Id.*] Additionally, a judge is very likely to discover physical and/or sexual assault/abuse committed against a minor seeking parental bypass. [App. 78a-79a, 186a-187a] When left to their own decisions, pregnant minor girls most often turn to the boyfriend who impregnated them for assistance. [App. 13a-15a][23]

Despite being mandated to report the suspicion of sexual abuse, abortion providers do not screen for or report sexual assault or abuse that has been committed against the minor girls who come to them for abortions without a parent or guardian. [App. 87a-90a] In 2002, Life Dynamics conducted an investigation of Planned Parenthood and National Abortion Federation clinics across the nation. A female employee of Life Dynamics called the clinics and presented herself as a thirteen-year-old girl having a sexual relationship with a twenty-two-year-old man who wanted an abortion without her parents being made aware. [App. 188a-189a]

The results of the investigation unequivocally demonstrate that abortion clinics do nothing to end the sex abuse of minors but rather further such abuse through their advice and inaction. Over 90 percent of the more than 800

[23] Ninety-three percent (93%) of girls sixteen years of age and younger who do not inform or involve their parents in their pregnancies, turn to their boyfriends for assistance. [App. 24a-28a, 138a-143a] In 36% of these cases, the boyfriend tries to persuade the girl to have an abortion. [App. 24a-28a] Boyfriends push girls toward abortion to avoid legal obligations. [App. 138a-143a]

clinics contacted failed to uphold their mandatory reporting duties. *See* Mark Crutcher, *Child Predators*, 3 (2002) *available at* www.childpredators.com/Forms/Child Predators.pdf. Most of the clinic workers acknowledged that the caller's sexual relationship was illegal and that they were required to report it to the authorities. *Id.* However, instead of reporting the abuse, clinic workers often told the caller not to give them any more information, such as her name, and then coached her on how to obtain an abortion while avoiding detection of her boyfriend's age. *Id.* Some of the coaching included advising her to call the next closest abortion clinic and then lie about her or her boyfriend's age, instructing her to come to the abortion clinic with the assurance that no age identification would be taken, instructing the girl to get her abortion in a nearby state where no parental involvement law existed, and even telling the girl to lie to a judge about her partner's age when pursuing a judicial bypass. *Id.* at 3-4. Many clinics offered the caller birth control that she could pick up when she came to the clinic, and some even said her adult boyfriend could pick up the contraceptive for her. *Id.* at 4. Abortion providers do not effectively report sexual abuse.

Male perpetrators of sexual abuse against minor girls have a great incentive to pressure and otherwise convince the girls to have abortions so as to hide the fact of the abuse and to destroy the DNA evidence of the sex crime. [App. 193a-196a] Minor girls are more likely to be influenced or coerced into having an abortion by their adult boyfriends or others than are adult women. [App. 24a-28a, 1c-3c] It is significantly more likely that DNA evidence of a sex crime committed against an impregnated minor will be preserved if the minor is required to have either a parent's

or a judge's consent before obtaining an abortion. [App. 193a-196a][24] With the preservation of evidence and the awareness of parents, many girls will no longer be subjected to sexual abuse.

IV. YOUNG GIRLS VERY OFTEN NEED ENCOURAGEMENT TO CONSULT THEIR PARENTS REGARDING PREGNANCY AND ABORTION, EVEN IN LOVING AND FUNCTIONAL FAMILIES.

Most young girls do not want to inform their parents of their pregnancy and abortion plans simply out of embarrassment and fear of parental disapproval of their sexual activity. [App. 4b-8b] In states with parental involvement laws and bypass proceedings, the most common reasons given by minor girls for wanting to avoid parental involvement are: (a) fear of rejection, (b) fear of disappointing parents, (c) wanting to spare parents the problem and stress of an unplanned pregnancy, and (d) wanting to deal with the problem of the unplanned pregnancy themselves.[25] In states with parental involvement

[24] In those rare cases where a parent of a pregnant minor who is seeking an abortion is abusive, the abuse is much more likely to be detected and stopped if the minor is required to appear before a judge in a bypass proceeding and, with the assistance of an attorney, explain and demonstrate the abuse. [App. 78a-79a]

[25] In one study in which about 50% of the girls reported they had supportive parents, Dr. Henshaw found that 73% of the responding girls did not want to tell their parents about their pregnancy/abortion merely because they thought the news would "disappoint" their parents; 32% simply did not want their parents to know that they were having sex; 32% thought that their parents might make them stop seeing their boyfriend; and 25% believed that their parents had enough stress already. [App. 16a-17a]

laws, most girls who pursue judicial bypass do so despite reporting that they have positive relationships with their parents. [App. 196a-198a, 198a-203a][26]

Left to their own juvenile devices, most adolescent girls do not seek suitable adult advice regarding abortion, and they often succumb to pressure and power differentials. [App. 24a-28a] Dr. Henshaw confirmed that 93% of the time when parents do not know of a young girl's abortion, *a boyfriend* is involved in "deciding on or arranging" the abortion. [*Id.*; Stanley K. Henshaw & Kathryn Kost, *Parental Involvement In Minors' Abortion Decisions*, Family Planning Perspectives, Sept.-Oct. 1992, at 205 (hereafter "Henshaw"); *see also* App. 138a-143a] For sixteen and seventeen-year-old girls, the percentage involving a boyfriend in their abortion decision or arrangements grows

[26] A parent's initial reaction of anger and frustration at a minor daughter's unplanned pregnancy is normal and is not an indication of a dysfunctional family. [App. 152a-153a] In a study of some 490 girls pursuing parental bypass in Massachusetts, 50% of the girls reported they had positive relationships with their parents. Yet, despite these positive parent/child relationships, the girls were seeking to bypass parental involvement in their abortions. Of these girls, 22.4% were trying to avoid parental involvement simply to avoid parental disappointment, loss of parental trust, or loss of parental respect. Another 22.2% of these girls wanted to avoid parental involvement simply because their parents held ideological views about abortion. Only three of the 490 girls (0.6%) reported that they feared possible physical harm from their parents. [App. 199a-202a] It is a good thing for parents and children to communicate, and it is not necessarily abusive for a parent to share a religious view about abortion with a child. [App. 203a] Even Dr. Laurie Zabin, former board member of Planned Parenthood of America and a long time abortion advocate, admits that it can be a good thing if family communication occurs between a pregnant daughter and her parents and the result of that communication is a decision for the daughter to not have an abortion but instead to give birth to her baby. [App. 192a-193a]

to 99%. [Henshaw at 205] "[A] minor's boyfriend was more than three times as likely as her father to be involved." [Henshaw at 206] Two-thirds of the time the boyfriend is an adult who has committed a sex offense against the young girl. [App. 143a-151a, 182a-185a]

Dr. Henshaw's study reveals that only 45% of all minor girls voluntarily informed their parents of their pregnancy and abortion plans [App. 17a-20a; Henshaw at 200] and that only 47% of the girls under age sixteen whose parents were unaware of their pregnancy involved "any adult" in their abortion decision and/or arrangements. [Henshaw at 205 table 8] (for girls ages sixteen and seventeen the percentage involving "any adult" only went up to 52%) [*Id.*] By the definitional parameters of Dr. Henshaw's study, the "involvement" which the "any adult" had in the girl's abortion "arrangements" may have involved only paying for the abortion or driving to the clinic. [App. 24a-28a] "Involvement" did not necessarily include any sort of "counsel" or emotional support.

Evidence shows that without the encouragement of a parental involvement law, minors often do not tell their parents or any adult other than their boyfriend about their abortion plans. With parental involvement laws in effect, the difference is dramatic. In Texas, parental involvement in abortion decision making by minor girls has significantly increased, from 69% to approximately 95%, after enactment of that state's parental notification law. [App. 182a-185a] In Massachusetts, where the state's parental consent law has been in operation for more than twenty years, the number of girls seeking parental bypass has substantially declined from a rate of 900-1000 per year in 1991 to a rate of 450-500 in 2003. Now, approximately 75% of girls in Massachusetts consult their parents regarding

their abortion decisions. [App. 203a-205a] With the encouragement of parental involvement laws, girls most often choose to include parents in deciding whether or not to obtain an abortion.

V. PARENTAL INVOLVEMENT LAWS HELP FOSTER AND PROTECT THE FAMILY STRUCTURE.

Minors should be encouraged to include their parents in the abortion decision because parental involvement strengthens the parent-child relationship. Parental consultation is usually desirable and in the best interests of the minor girl seeking an abortion. [App. 98a-105a] It is emotionally healthy for adolescents to work through difficult issues with their parents and to face the stress of parental reactions. [App. 112a-117a] Minors who keep secrets from their parents about important issues in their lives tend to be more depressed and experience more emotional pain. Secrecy between a minor and her parents is not healthy, and it causes the minor excess anxiety. [App. 119a-123a, 123a-126a]

The family structure is also strengthened by the decline in the pregnancy rate following enactment of parental involvement laws. Despite assertions to the contrary, there is no evidence to support the notion that parental involvement laws cause increases in teen birth rates. [App. 31a-33a, 33a-35a] Dr. Henshaw explained that studies conclude minors may actually avoid pregnancy because of parental involvement laws. [Tr. 33a-35a] The Rogers Study reflects that during four and one-half years while the Minnesota two parent notice law was enforced (1981-86), teen pregnancy and abortion rates dropped while the teen birth rate continued its steady decline in

line with long term trends. [App. 33a-35a] Dr. Henshaw testified that the Rogers Study reveals the appearance of "a depressive effect on the pregnancy rate because of the [Minnesota parental notification] law." [*Id.*]

Both the teen birth and abortion rates have declined in Massachusetts since 1981. [App. 205a] Similar experiences have occurred in Indiana, Kentucky, Michigan, Mississippi, Pennsylvania, and South Carolina. [App. 126a-138a] The Texas parental involvement law appears to have caused in part a reduction in the teen pregnancy rate (5% reduction from 1999-2000), the teen abortion rate (reversing a 3-year trend of increasing rates from 1997-1999), and the teen birth rate (minors made up a smaller percentage of the overall births in 2000 than in 1999). [App. 180a-182a]. Though parental involvement laws are intended to benefit minor girls during their crisis pregnancies, by reducing the number of teen pregnancies, the laws not only ameliorate the effects of the problem but actually reduce its rate of occurrence.

CONCLUSION

Parental involvement laws are in the best interests of both minor girls and their families. Minor girls need involved parents to help navigate the health care system, monitor for complications, provide support and counsel, and put an end to the sexual abuse of minor girls. Young pregnant girls deserve the protection and support that can be provided only by parents who are aware of their daughter's condition.

For all of the above reasons, the lower court decision should be reversed.

Respectfully submitted,

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APPENDIX A

TRIAL TRANSCRIPT SELECTIONS FROM *PLANNED PARENTHOOD OF ALASKA V. STATE* IN THE SUPERIOR COURT OF ALASKA, 2003, CASE NO. 3AN-97-6014 CIV.

TESTIMONY OF DR. LEMAGIE

Q And do you approve of Planned Parenthood's position of – that are in these tapes of telling girls that they're not going to inform the authorities about their having a relationship with an adult boyfriend?

MS. CREPPS: Objection, Your Honor. I don't think that's a precise characterization of what's in the tapes. The tapes aren't in evidence, so I would argue that there's no foundation for that statement.

THE COURT: I'm going to sustain it for lack of foundation, because I don't think this witness has heard the tapes, so unless you can. . . .

MR. DAVIS: All right, I can re – I. . . .

THE COURT: . . . . explore further on that.

MR. DAVIS: . . . . can rephrase the question. . . .

THE COURT: All right.

MR. DAVIS: . . . . and reach the same result, Your Honor.

THE COURT: I know. I'm sure you can.

Q Okay. Doctor, would you approve yourself of Planned – if, in fact, a girl was being told that Planned Parenthood was not going to inform the authorities about her relationship with an adult boyfriend?

A No, I. . . .

Q Would you approve of that?

A No, I wouldn't approve that.

Q So if this – these kind of things are occurring, then it's not with your approval; is that correct?

A Correct.

Q Now, do you approve a policy – a Planned Parenthood policy of sort of don't ask, don't tell policy, in other words, regarding revealing relationships with adult boyfriends? Would you approve that policy? In other words, just simply don't ask what the age is.

A No.

Q All right. In your own practice do you ask the age of the girl who comes in for an abortion, of the age of her boyfriend?

A Not always.

Q It's not in your forms, is it?

A No.

Q Uh-huh.

A Lots of those questions are not on my forms.

Q Right. And isn't it true that in your 23 years of experience in practicing you have yet to ever report one instance of a situation where a girl came to you for abortion services that she had been impregnated by an adult boyfriend; isn't that true?

A That's true, because I've never been – never encountered it. The only situation where I've encountered those kinds of situations are where the troopers bring the

patients to me or I go to the emergency room, where I assist in law enforcement on those issues. I'm sorry, I don't see that many 14-, 15-year-old people. I don't always ask the question because sometimes the partner's right there in the room with her and he's obviously her age.

* * *

Q But you were able to provide abortion services to girls who seek abortions with their parents; is that correct?

A Correct.

Q In fact, you agree, Doctor, that in most situations it's a great benefit to have parents involved in making decisions about medical care for children; isn't that correct? And we're talking about girls from the – in this age range from 10 to 16. Isn't that true?

A I think – I encourage all minor women to bring in their parents, and. . . .

Q And. . . .

A . . . . I think that it's very important to have as much support as possible.

Q So you agree with the statement that you think it's generally a good idea to have them there.

A If you're saying generally and it doesn't apply to all, I'll agree with you.

Q All right. Now, approximately 50 percent of the girls that you provide abortion services to you've never met before they walked in the front door; isn't that correct?

A I would say that's about right.

Q Now, regarding your treatment and prenatal care, you've gotten out of that field; is that correct?

A Correct.

* * *

Q All right. Doctor, do you believe that these children – you – when – you would agree that these children up to 15 aren't as capable of giving informed consent as an adult; is that correct?

A With the qualifications that I said before, I – I think that they're – I think that they benefit – and I think young adults, also, whatever you want to call them – benefit from adult guidance, and it doesn't make any difference who they get that guidance from, and there are certainly varying degrees of maturity with, you know, younger teenagers.

Q These young – these girls from 16 to 10 years old, you don't believe that they are able to provide the same level of postoperative care for themselves as an adult woman, do you?

A I think that if they have an adult that they can rely on, and it doesn't have to be a parent, that I would have no problems with them being able to be compliant with followup.

* * *

Q Now, regarding the patient instructions for medical abortion on page 5, is this given to the girl or is she – is this – or this read to her?

A This is given to the girl and read to her.

Q And she's told that basically if she has a fever over 102 degrees lasting more than four hours, she's supposed to inform you of this; is that correct?

A Right, because the misoprostol can induce a fever. It's a medication-induced fever. So you don't want to have them call with mild temper elevations, because it's most likely medication. This says lasting more than four hours, or onset of fever two or more days after the misoprostol. It's much less likely to be a medical side effect.

Q So you don't see any problem with girls in this age range from 11 to 16 following these instructions without parental assistance.

A I encourage them to get parental assistance, and I have not done medical abortion on girls in that age range.

Q But the point is you – under the laws of the state of Alaska you can do medical abortions of girls in that age range, is that correct, without parental consent.

A I think that my medical judgment and my assessment of the situation and the – the girl's support team is what helps me decide what's the best procedure for her under those circumstances.

* * *

Q So we have this child 16 years or 15 years old and she just looks to have an abortion, but she doesn't have the money for the cash payment for the complications, she's going to be up the river, then; is that what you're saying, Doctor?

A That's right. If she has a complication that requires – if she needed a blood transfusion or a problem

that required hospitalization, she has to understand that's a risk she's taking.

Q And don't you agree that perhaps it'd be good to have a parent involved to. . . .

A Well, I think it's an excellent idea. . . .

Q . . . . guarantee that there would be

A . . . . for her to have an adult and/or. . . .

Q . . . . money available for postabortion complications?

A . . . . parent involved. I totally agree with you.

Q All right.

A But I don't think it should be required and I don't think it should be a parent, necessarily a parent.

Q Adult boyfriends? I mean, you want some adult to pay the bill. I mean, that's what it boils down to, right?

A We don't – I – don't go there.

* * *

Q Thank you. Now, also isn't it true that minors might not even know their own medical history, especially about events that occurred when they were very young?

A Possibly.

Q All right. And isn't it true, also, that a girl might lie to you about her medical condition in order to get an abortion, without considering the consequences of lying to you about that? Isn't that possible?

A That's a possibility.

Q And isn't it true, Doctor, that girls often misperceive that their – about their parents' reaction to their unwanted pregnancy, and often that misperception is more negative than what it actually is?

A That's true.

Q And isn't true, also, these girls often are more concerned about their parents being disappointed in them and finding out about that they're engaging in unprotected sex as being one of the reasons why they don't want their parents to know about it?

A That's one of the reasons, but as I testified yesterday, the – the people – the young women I see who are most concerned about their parents, research has shown that they have the most reason to be concerned. . . .

Q And those could be some. . . .

A . . . . but they may come from abusive family backgrounds.

Q Right. And some of those concerns may not be for the fact – they're not concerned about the parent supporting their abortion decision, but they just don't want them to know about the fact that they're getting an abortion. Isn't that true?

A They may be correct in their perceptions that they may actually get verbal or physical abuse about their discussion with their parent.

Q Isn't it true, Doctor, that when most parents find out about their child's pregnancy that they support their decision on getting an abortion?

A That's true, and that's what I tell the patient when she comes in.

Q And isn't it also true, Doctor, that these children we're talking about, again from 16 and under, are far less reliable in getting follow-up care than your adult patients?

A Not in my experience.

Q Didn't you testify in your prior deposition that that was true, and you've even noted that they have transportation problems getting there? Do you recall that, or do you want me to show you your deposition?

A No, I will say that transportation problems are an issue, but, again, we're talking about limited numbers of patients.

* * *

Q I know, Doctor, but the question is most girls 16 and under live with their parents.

A Correct, but not necessarily the ones I've seen.

Q Certainly, and there are always exceptions to every rule, isn't there?

A Correct.

Q You also agree, don't you, Doctor, that there are severe con – psychological consequences from having abortions.

A No, I do not agree.

Q You don't recall. . . .

A And I testified to that yesterday as well, that the American College of Obstetrics and Gynecology has made

that statement in their last technical bulletin about abortion.

Q Okay, let's go back to your testimony, Doctor, on page 63 of your transcript. Doctor, do you believe that there are psychologic consequences for the abortion decision?

Your answer: Yes.

Question: And do you provide your abortion patients yourself, do you provide some information about those possible consequences?

Answer: Yes, and I refer a hundred percent of them to counseling. Now, does that refresh. . . .

A Correct.

Q . . . . your memory?

A Yes, and your question this morning was severe or serious psychological consequences, and I can't agree to that.

Q All right, so you're just saying that the degree – you disagree as to the degree of consequences where – you agree there are psychological consequences, right?

A I – as I. . . .

Q Are you. . . .

A I said that the psychological consequence that most women feel after abortion is a sense of relief.

Q Do they need counseling for their sense of relief, Doctor?

A No, if they're ambivalent at all about the decision I encourage them to get counseling, and, in fact, I've refused to do abortions on women who are ambivalent.

Q Doctor, do you – don't you recall your testimony, you refer a hundred percent of them to counseling? Is that true?

A I offer a hundred percent of them counseling referral. That's my standard description of the service offered.

Q And do you. . . .

A Right after I've offered them the – explained the other options. . . .

Q Right, and do you. . . .

A . . . . so if they have any doubt about their decision whatsoever, that they understand that they can go see someone else to discuss it with.

Q All right. And, Doctor, don't you believe these 16-year-old girls and under who get abortions should have some counseling afterwards?

A No, not necessarily. That's their decision with their adult or whoever they have chosen to confide in.

Q Wouldn't you recommend to the girl to get counseling after she had an abortion?

A No, not after she had an abortion. If she came in and was having problems, I would recommend that.

Q You agree, Doctor, that the – suicide is the third highest cause of death for teenagers? Are you. . . .

A I would be not surprised. I'm not able to pull that statistic out myself.

Q And don't you agree that it's important to monitor 16-year-old girls and younger for possible depression after abortions?

A Yes.

Q And it's important to have parents aware of that potential problem?

A Or another concerned adult.

* * *

Q Wouldn't you agree that one of the most important factors in the risk fac – of delivery is the quality of prenatal care a woman is getting?

A No, I wouldn't say that. In terms of – some women come in without any prenatal care and have absolutely normal deliveries. When they've tried to increase and encourage, particularly inner city women, to receive more pretal [sic] – prenatal care, they have not been able to improve the complication rate. There's – we've been very mortified by our inability to affect, for example, the preterm delivery rate, which is the – one of the major complications of pregnancy in the United States. It's remained constant over about the last 50 years, despite all of our advancements in prenatal care, and that's one of the most important indicators of neonatal and – mortality and morbidity.

Q You would agree, wouldn't you, Doctor, that good prenatal care is always in the best interest of a minor girl who's pregnant; is that correct?

A Yes, I would agree to that.

Q Would you also agree that having abortion may or may not be in her best interest?

A No.

Q So you think an abortion is always in her best interest, Doctor?

A Well, I'm sorry, if we're playing little semantic games, it may not be in her best interest.

Q All right, thank. . . .

A That's my job as a doctor, taking the history and doing a physical exam, to offer my professional judgment and, you know, make sure that she understands the risks pro and con to any of her decisions.

Q So the answer to my question is an abortion may or – may not always be in the best interest of the minor child.

A Correct. Or – no, I'll – I'll stop there. Sorry.

Q Thank you. Now, you've indicated that you're concerned about the – an in – possible increase in illegal abortions if this parental consent statute goes into effect. You testified to that; is that correct?

A Right, and other experts have testified to that, and, in fact, that was. . . .

Q Doctor, just answer the que – . . . .

A . . . . one of the concerns of the. . . .

Q Just – Doctor, can you just answer the question? You. . . .

A That is a. . . .

Q . . . . testified to that.

A . . . . possibility.

Q Yeah. Now, do you have any studies which support such a finding in states which have parental consent studies – parental consent statutes in effect? Do you have any evidence of that? And if you do, tell me about it. What study?

A No, I don't have any evidence from that study. I do have information af – even after Roe v. Wade illegal abortions continued to occur, because women were so concerned about confidentiality.

Q Doctor, you don't have any studies showing that there's been any increase in illegal abortions in states that have parental consent statutes in effect; isn't that true?

A That is true.

TESTIMONY OF DR. HENSHAW

Q Okay. And how many women under 15 have abortions performed after eight weeks, compared to women of other ages?

A Okay. After eight weeks – 60 percent of under 15s have their abortions after eight weeks, compared to 52 percent of women 15 to 19, and 40 percent of women 20 and over. This information comes from the tabulation of abortion data by the Centers for Disease Control, which is among our exhibits here.

Q Okay. Can you turn to – it's in the black binder number 4 – Exhibit 145?

A Yes.

Q Is that the document you're referring to?

A This is the document, and the relevant table is table 16 of this document.

Q Okay. And what page is table 16?

A Page 27.

Q Thank you. And how. . . .

A I had to calculate some of these percentages myself, but the raw data are there.

Q And how many teenage women obtain abortions after 12 weeks, compared to women age 20 and over?

A Well, these are, again, my calculations from this table. Twenty – 25 percent, one-fourth of the abortions to women under 15 were past 12 weeks, 17 percent of the abortions were women 15 to 19, and 11 percent of the abortions for women age 20 and over.

Q And in your – from your professional experience do you have information on the reasons minors – when minors get their abortions and why they tend to get them later?

A Well, based on the study I referred to before, why women have abortions, the main reasons were, first, as I mentioned, not wanting to consult other people that they might be pregnant. Another reason is the time required to make arrangements to get the abortion; that is, the travel, getting the money together, and finding where to go and making appointments.

* * *

Q Okay. In a minute I'm going to get to ask you – like you to describe to the Court a little bit about that study, but first I'd like to get your opinion on who minors involve when making their decision to have an abortion.

A Well, they of – I think that my best information would be from the study.

Q Okay.

A And we can look at table 8, and there are different meanings of involvement. You can discuss the decision, or you can get help or – from a person, or you can just inform and discuss the issue with a person. In this table we report the results of several questions: people trying to persuade them, people helpful in the decision, people accompanying them to the clinic, people helping to pay.

Q And your research, what did your study find about who minors consult when making a decision whether to have an abortion?

A Well, the people most helpful were the boyfriend and the mother and friends.

Q Okay. Did most minors involve their parents in their decision?

A Well, most minors said that their parents knew about the pregnancy and the situation. Sixty-one percent of all the minors in this study which were under age 18 said that their parents – one or both parents knew they were pregnant.

* * *

Q What were some. . . .

A Yeah.

Q . . . . of the negative consequences that they feared.

A Well, shall I read down the list?

Q Yes, if you could just read some of the percentages, please.

A They didn't want to hurt or disappoint their parents, 73 percent. Thought the parents would be angry, 55 percent. Didn't want the parents to know they were having sex, 32 percent. Thought parent would try to make them stop seeing their boyfriend, 32 percent. Parent has too much stress already, 25 percent. Didn't need parent to help me decide what to do, 23 percent. Thought it would cause problems between parents or between parent and stepparent, 20 percent. Thought parent would make me leave home, 18 percent. Thought I would be punished in other ways, 15 percent. Thought parent would try to make me continue the pregnancy, 14 percent. Thought I would be beaten, 6 percent. Thought parent would try to make me have an abortion, 5 percent. And others – other cons – reasons were given by 12 percent.

Q And in the study did you look at the actual reactions of parents to the news of their daughter's pregnancy?

A Well, the daughter's description of the reactions, yes.

Q And according to the daughters how did the parents react to the news of their pregnancy?

A Well, a lot of them – there's a table here. Let me just look at the table. Maybe there isn't a table. About equal proportions were – had – were supportive. I mean, they were not happy, but, generally speaking, the parents were supportive of the – the daughter in her time of trouble.

Q And was there any difference in reaction between – of the parents between the minors who voluntarily told their parents and those whose parents found out a different way about their pregnancy?

A Yes. The minors whose parents found out a different way were predominantly angry and had – had much more negative reactions to the fact.

Q And what sort of negative reactions did they have?

A Again – well, I don't remember exactly where we reported that, and I'm not sure I remember the details too well, but. . . .

* * *

Q Okay. Let me draw your attention – this is a document that's attributed to the American Academy of Pediatrics. Are you familiar with that organization?

A Yes.

Q And apparently approved by the Council on Child and Adolescent Health. Are you aware of that organization?

A No, but I understand that most of these associations have subgroups concerned with different particular topics.

Q Okay. Sir, if you'd turn to page 2 of that document, please, and can you see the paragraph that's marked voluntary parental involvement?

A Yes.

Q Okay, in the second column there?

A Yes.

Q The third sentence, could you read that to us, please, that begins with survey.

A A survey of 1,519 unmarried pregnant minors in states where parental involvement is not mandatory found that 61 percent told one or both parents about their intent to have abortions.

Q Okay. Now, sir, if you look there there's a footnote. Actually, it's after the next sentence. And if you look in the back, footnote 19, on the last page, that's a citation to your study that you've been testifying about; is that not right?

A That's right.

Q Okay. And it's correct, Dr. Henshaw, that you never said in that study or as a result of that study that 61 percent of the minors in your study group told their parents about their pregnancy and desire for an abortion.

A No, 45 percent told their parents, and the rest – in the rest of the cases the parents found out some other way.

Q Okay, so their statement in this authoritative article here that a study of 1519 unmarried pregnant minors in states where parental involvement is not mandatory found 61 percent told one or both parents about

their intent to have abortions, that's incorrect; isn't that right?

A It's not completely correct.

Q It's. . . .

A Right.

Q Is it. . . .

A It's – it's incorrect.

Q . . . . not, sir – it's entirely incorrect, is it not?

A Yes.

Q Okay. Now, sir, as a responsible social scientist, especially since they cited your study, had this been peer reviewed do you think you would have made some comment or change to this document?

A I would, yes.

Q And especially if you knew that this document was going to be relied upon by professional obstetricians and gynecologists. Correct?

A It doesn't matter. I would try to make it a correct statement, regardless of what the purpose was.

Q Okay, sir. The next sentence there, could you read the next sentence that begins with the younger?

A The younger the minor, the more likely she was to do so: 90 percent of those 14 or younger, 74 percent of those 16 years old.

Q Okay. And, again, there's a citation there to your study. Now, sir, is that a correct statement of what your study showed?

A It's not technically correct. I – I think most people reading it wouldn't really make the distinction between whether the minor told the parents or whether the parents found out. I think that the point was probably correct, that the parents knew. They should have phrased it in that proportion of the cases the parents knew, but in fact for the four – under 14 it was more likely that the parents found out some other way than that she told them.

* * *

Q And did your study – at least in the printed analysis you put in your study that 11 percent of those minors said their parents were making them have an abortion?

A Yes.

Q Okay. Now, abortion providers don't provide abortions unless the patient wants one, right?

A That's right.

Q So. . . .

A Unl – well, unless the patient freely decides that that's what she wants, yes.

Q Okay. So you're saying 11 – let me go back here and just set the stage, so we understand. These questionnaires were handed out during about a six-month period at abortion clinics that do several hundred abortions a year to minors who were there for the purpose of getting an abortion.

A Correct.

Q Okay. And so 11 percent of those – actually, 11 percent of the 16 percent of those minors whose parents found out on their own.

A No.

Q It's 11 percent of the total?

A It's 11 percent of all those whose parents knew. Eighteen. . . .

Q Okay.

A . . . . percent of the minors whose parents found out said that they were being forced to have an abortion.

Q Eighteen percent.

A Eighteen percent.

Q And did they get abortions, do you know?

A Yes. These are all people who got abortions.

Q Okay. The question number 7 – or response 7 in your request in 25 here was the health of my parents has suffered. Did you explain anywhere in your questionnaire what you meant by health of my parents?

A No.

Q Number 11 – well, let's go to 9. It caused problems between the parents I live with. Did you explain anywhere or – for the respondent what you meant by problems?

A No.

Q Physical violence in my home, there was physical violence in my home, qu – answer number 10. This is one

of the responses on which you based your conclusion that a lar – a certain percentage of these minors were subject to violence in the home because they had – their parents had found out, right? I'm referring to. . . .

A Yeah, yeah.

Q . . . . question 10 – or response number 10.

A We didn't assume that the minor was – was the target of the violence.

Q Okay. Did you define anywhere what violence was?

A No.

* * *

Q Okay, and we talked about this yesterday and so on. Doctor, if you look at page 203 of that – I'm sorry, would – yeah, would you turn to 204 first, please? And next to table 7 the second column there, there's a paragraph that says be – that begins by the time of the abortion. Do you see that one, sir?

A Yes.

Q It says only seven percent of the mothers and eight percent of the fathers still wanted their daughter to continue the pregnancy, and this is percentages of parents who knew about the abortion; is that correct?

A That's correct.

Q Okay. So if we do subtraction, then, that's basically saying, is it not, that 93 percent of the mothers, 92 percent of the fathers who were aware of the abortion – of the pregnancy were in favor of abortion by the time that

the child reached the clinic and filled out this questionnaire, correct?

A No, sir. There were a certain number where the opinions of the parents were unknown to the minor. The ones where the minor knew – it's approximately correct, but I think it may not take into account the unknowns.

Q Okay. But it doesn't say that there, does it? It doesn't indicate in that sentence I just read that there's some other numbers out there.

A It says that seven percent of the mothers, and when you say the mothers it might have included those in the denominator where the minor did not know.

Q Okay. Well, Doctor, isn't it. . . .

A But – but that's – that's approximately correct.

Q Okay.

A That's approximately correct.

Q We can agree, then, that it's a very high percentage of the parents who knew about the abortion favored the child's abortion by the time they got to the clinic, right?

A That's correct.

Q Now, Doctor, isn't it true that in your study here on this document that you found that the parents were more likely to be angry or upset if they found out on their own about the daughter's pregnancy and desire for an abortion, rather than if they were told by the child?

A That's correct.

Q And you also said, did you not, in this article that this may reflect the disappointment of those parents who were not told that their daughter had not told them; is that correct?

A I don't recall that line in – in the article.

Q Okay, would you look at page 203, please?

A Yes.

Q And the sentence beginning at the bottom of the second column just above the table, and you cited – you quoted the first part of this in your direct testimony, and I'll just read it to you. The more negative reaction to parents who found out may reflect the correct judgment of the daughter who avoided telling them. And you told us about that in direct testimony, right?

A That's right.

Q Okay. But then the sentence goes on to say it may also reflect the parents' disappointment that their daughter had not confided in them.

A That's. . . .

Q Is that correct?

A Yes.

* * *

Q Doctor, isn't it true that your testimony is attempting to extrapolate the results of this study to the future of minors in Alaska?

A Yes.

Q And isn't it also true that the law we're talking about here, the parental consent law in Alaska, would involve minors 16 or younger, and not minors 17?

A That's correct.

Q Doctor, would you agree that minors are susceptible to adult influence in a lot of their decisions?

A Yes.

Q Turn to – if you turn to, please, table 8 on page 205, and if we look at the column of those headed tried to persuade respondent to have an abortion, and if we look at the column where neither parent knew, isn't it correct that for those minors who are under 16, in the column under 16, whose parents didn't know about their pregnancy, that 36 percent of the time their boyfriends tried to persuade them to have an abortion?

A That's correct.

Q Would you also agree from that table that the boyfriend was involved in the decision of the minor who was there for an abortion over 90 percent of the time for all of the minors in your study?

A For all of the minors in the study?

Q I'm sorry, all of the minors under 16 – 16 or un – pardon me. All of the minors under 16 in your study.

A Do you mean the minors for whom neither parent knew?

Q Correct.

A Involvement doesn't – in this table doesn't mean involvement in the decision. It means involvement in

decision or arranging the abortion. So the 93 percent of boyfriends included those who may have had no role in the decision, but accompanied the minor to the clinic or helped pay for the abortion or helped in other ways. So in. . . .

Q Okay.

A . . . . terms of – we don't know for sure that they were involved in the decision.

Q If they accompanied the minor to the abortion clinic you didn't consider them involved in the decision?

A I wouldn't necessarily.

Q Okay. But isn't it true, and I thought that was my question, that for those minors under 16 your data shows that a boyfriend was involved in their decision over 90 percent of the time?

A I tried to explain the boyfriend was involved in the decision or in making arrangements. . . .

Q Okay.

A . . . . for obtaining the abortion.

Q All right.

A Or by accompanying the minor.

Q Doctor, in that same table, and I think you testified to this before, about the number of minors in your study who had consulted a professional before arriving at the abortion clinic, and is it not true that only 22 percent of those minors 16 and under had consulted some professional before coming to the clinic and filling out this survey?

A That's correct.

Q And isn't it also true that more minors consulted a professional if their parent knew of their pregnancy than did those minors whose parent did not know?

A That's true. The difference is small, but that's true.

Q It's like six – four percent; is that not right?

A That's right.

Q Doctor, you had data, did you not, when you did this study or after you did it where you could show how many of the boyfriends involved with these minors were over – 21 years of age or over, correct?

A That information for almost all the boyfriends is in – in the data set.

Q You didn't put it in this published study, did you?

A No.

Q And, Doctor, you have stated in the past, have you not, that you don't think prosecution of statutory rape is particularly beneficial to a minor; is that correct?

A That's correct.

Q Doctor, going back – I think we're through with this study for a moment, but going back to the memorandum from yourself to Dr. Forrest, number 2243, we talked about yesterday, I'm just going to ask you a general question about it. Is that the kind of a memo that you regularly use to communicate with your superiors on studies of this kind?

A Maybe you could explain the question a little more. I think that that was – I don't know what you mean. There. . . .

Q Okay, it. . . .

A . . . . there are other – let me try to answer your question. There are other occasions when I wrote memos about information that might be related to whether we should do a study or not. That's true.

Q Okay. So this was kind of a regular thing. You didn't make a special effort to put a memo – to send a memo to your boss just on this one study idea.

A I didn't do this very often, that's true, but I'm sure it happened at other times that I would write memos.

Q That you would communicate in writing, rather than face to face?

A Yes.

* * *

Q And isn't it correct, Doctor, that in this article you stated that in 1994 about 47 percent of women in the United States who had abortions that year had had at least one before?

A I'm sorry, what percentage?

Q Forty-seven percent.

A That's – that sounds correct.

Q Okay. And, in fact, if you look at page 5 – it – it's numbered 5 at the bottom. It's 15 at the top.

A Right.

Q And it has a section on repeat abortions?

A That's correct.

Q And, Doctor, is it also correct that you stated that Canadian statistics show approximately 25 percent of teenage abortion patients will have another abortion within the next four years; is that correct?

A That's correct.

Q And, Doctor, if you look at page 8, please? And the paragraph – first par – full paragraph on that page, isn't it correct that you stated that the delay among younger women in obtaining abortions probably reflects their inexperience in recognizing the symptoms of pregnancy; is that right?

A That's correct.

Q Their reluctance to accept the reality of their situation; is that correct?

A Yes.

Q Their lack of knowledge of where to seek advice and services?

A Yes.

Q And their hesitation to confide in adults.

A Yes.

Q And you stated adults, not just parents, correct?

A Yes.

Q Now, Doctor, on page 10 of this article isn't it correct that there is no complete database of complications from the abortion in the United States?

A That's right.

Q And isn't it also correct, Doctor, that you stated on page 10 that only about one-third of abortion patients return to their provider for follow-up care; is that correct?

A That's right.

Q And isn't that one of the reasons, then, why you state that there is no really complete data on abortion complications?

A No.

Q Okay. If you look at the bottom of page 10, the last paragraph there, you say the largest database of abortion complications in the United States is maintained by the National Abortion Federation, correct?

A Yes.

Q Okay, we talked about the NAF yesterday, and isn't that correct that that is a group, really, like a trade association of abortion providers?

A That's right.

Q Okay. And you go on to say in 1995 a total of 175 NAF members reported information on 241,986 abortions at all gestational ages. Follow-up information was available for 30.7 percent. Is that right?

A That's right.

Q Okay. Now, Doctor, would you agree, then, that that's one of the weaknesses of these NAF figures, is that a large number, like almost 70 percent, don't come back for their follow-up visit so they can see if there are complications, correct?

A The – most of the complications are not identified by a follow-up visit. The follow-up visit generally identifies people without complications. It's very rare that the follow-up visit is the point at which the complication is identified. The complications here are from – primarily from women who call back to the abortion provider. . . .

Q Okay.

A . . . . to – for – for care because of a problem.

Q You're not a medical doctor; is that correct, sir?

A That's correct.

Q And you haven't ever done treatment, either pre-, during or post abortion for any woman, correct?

A That's correct.

* * *

Q All right. So if we add up the 2802 that were instate minors, the 20 – the 1141 who are out-of-state minors, we get around 3900 minors' abortions, correct?

A That's right.

Q Okay. And then we go back up to 1980 before the law was in effect and we see – just excluding for a moment the numbers who left state – you have at least 5,113?

A That's right.

Q Okay. If we don't even add any more, then that's a difference of over a thousand, correct?

A Yes.

Q And isn't it also true this study didn't find any significant change in the birthrate for minors?

A The authors concluded there might have been 50 additional births. That's pretty questionable.

Q Questionable as to what?

A As to the reliability of that figure. They didn't claim it was reliable, and I wouldn't put a lot of reliance on it, but they. . . .

Q They didn't find a change, significant change in the birthrate, correct?

A They considered it significant enough to report, but I wouldn't consider it real significant.

Q Doctor, isn't it true that you could gather – or one could gather from this study that the pregnancy rate in Massachusetts went down after the implementation of the two-parent consent law?

A I – no, I – I wouldn't draw that conclusion.

Q I know. . . .

A To draw that. . . .

Q . . . . you wouldn't, sir. Isn't it possible for someone to look at this and draw that conclusion?

A I think before you would draw that conclusion you would – the conclusion would properly be drawn by looking at the trend over time, plus a comparison of the minors

to older women 18 to 19 years old, for example, which might have also been influenced by some trends at that point in Massachusetts. So you wouldn't – I don't think – I don't think any responsible scientist would draw that conclusion without much more statistical work with the data.

* * *

Q But for minors the proportion of late abortions fell with the law, while the proportion of early abortions rose. Correct?

A That's correct. I would not say that was a conclusion of the study. This is. . . .

Q Sorry?

A . . . . a find – that's not a conclusion. It's a finding. It's a result of the data she looked at.

Q Okay. So it's a finding of the study, but not a conclusion. You would agree with that.

A That's right.

Q Okay. Now, Doctor, isn't it also true that in the explanations that the author of this study gave, that the author concluded, and this is a conclusion, is it not, that more minors may have avoided pregnancy because of these parental involvement laws? Is that correct?

A If you could point to that?

Q Sure. Alternative explanations, the bottom of the same page.

A Yes.

Q It says there are several ways to explain findings that instate abortions fell in response to parental involvement laws, while birthrates did not rise. First, more minors may have avoided pregnancy when faced with the laws. Correct?

A Yes. That's – yes. They state that as one possibility.

Q Okay. Okay, Doctor, if you could go to 120 – sorry – number – Exhibit 120. And this is "Impact of Minnesota Parental Notification Law on Abortion and Birth," by several authors, the lead author, Dr. Rogers. You've seen this study before, correct?

A Yes.

Q And, in fact, did you testify about this one yesterday? I believe you did.

A Yes, I did.

Q Okay. And isn't it correct that Dr. Rogers stated in this article that for ages 15 to 17 the number of late abortions per 1,000 women decreased following the enactment of the law. Is that correct?

A That's correct.

Q And he concluded, therefore – I guess that's a conclusion, right? Therefore. . . .

A Yes.

Q . . . . s increased medical hazard due to a rising number of late abortions was not realized. Correct?

A Yes.

Q And, Dr. Henshaw. . . .

THE COURT: Counsel, where were you reading from again? I'm sorry, I couldn't find it.

MR. DOOGAN: I'm sorry. Page 4, and in the last – I'm sorry, the single column of parent – it – it's actually numbered page on the article itself.

THE COURT: Okay.

MR. DOOGAN: The column on the right.

THE COURT: Uh-huh.

MR. DOOGAN: The second paragraph at the bottom. It says: Regardless, the claim the law caused more minors to obtain late abortions is unsubstantiated. In fact, the reverse is true for ages 15 to 17. The number of late abortions per thousand women decreased following the enactment of the law. Increased medical hazard due to rising number of late abortions was not realized.

Q And, Dr. Henshaw, you've stated before, have you not, that from this study that there appeared to have been a depressive effect on the pregnancy rate because of the law in Minnesota.

A That's right.

Q Dr. Henshaw, you would agree, would you not, that if the law we're talking about here in Alaska actually reduced the number of teen pregnancies, it would be beneficial to minors?

A I think I could agree to that. That's a value judgment, but I think I would agree with that.

TESTIMONY OF DR. SHADIGIAN

Q All right. And from your clinical experience, and I'm not only speaking of the experiences at your – at Baltimore, but also the entire time of your medical career so far in dealing with these girls, do you think it's necessary to have parents involved in a pregnancy decision of whether to carry the child to term or to have an abortion?

A I think parental involvement is the key for the long-term mental and physical health of young women, for several reasons. The children are especially vulnerable. They haven't had time to go through the normal developmental stages of adolescence many times. We're talking about young ladies, especially 16 and younger, haven't fully matured into adult thinking, and therefore need the help and guidance of another adult. The obvious choice are the adults who know them best, who are their parents. So as much as young ladies are usually very afraid to talk to their parents, in fact, they're the – the single most qualified adults who know their children the best, who can actually help their children through the most critical time that they've probably ever experienced in their entire lives. So that I absolutely agree that parental involvement and consent in this decision will on the whole, regardless if abortion is the choice that is made or not by young women, will absolutely help them be able to become fully developed adults who have the least amount of scarring from these experiences.

Q Now, specifically in the area of informed consent in dealing with these girls and this age range – we're talking about from age, I guess, 10 to 16. I guess as young as 10.

A That is correct

Q From 10 to 16 – are there specific problems for a doctor in getting informed consent from a girl in this age group pertaining to any type of surgical procedure?

A As we all know, parental consent is necessary for any kind of surgical procedure under age 18 in states, so whether a young child is undergoing a tonsillectomy or having an ovarian cyst removed or having bowel surgery, parental consent is both deemed important and necessary and legal, for any kind of surgical procedure. So you can look to all other parts of medicine and see that this is considered a standard of care.

Q Pertaining to surgical procedure regarding abortion, in your – and, again, regarding your contacts with these young girls, do you believe that they are able to understand the risk and consequences without assistance in making an informed and intelligent decision in this area?

A Most young children of those ages have never had surgery themselves, they've never experienced maybe even very many periods that they've had, so when you tell women that are young women that they're going to have vaginal bleeding, they've only had three periods, they're not going to have the same kind of conceptualization of what that is, as compared to when they're older. So on something as simple and as obvious as how much vaginal bleeding is normal after certain procedures, they may just have not a lot of experience with those things. For all of the different risks, we talk about bleeding, infection, damage to the internal organs, et cetera, it may be difficult for them – they may not have had a lot of biology in school yet and a lot about human anatomy, so sometimes, just like people who don't have English as a first language,

take more time to explain things, young women certainly have the capacity to understand certain kinds of concepts, but it takes longer to explain them. Pictures are very helpful to explain to people, and – and showing them on their own bodies things are very helpful. We do that routinely with pelvic exams for young girls who've never experienced them. I take a long time explaining the instrument we're going to use and how it's appropriate to touch in certain ways and not other ways. So anyone who's just new at understanding different techniques or different procedures, it just takes longer to explain in a really full way so that real informed consent can be obtained.

Q And do you believe that parents are necessary and valuable in obtaining informed consent from girls of this age pertaining to abortion procedures?

A I do, because the parents are going to be the ones who later on – I mean, every office visit is – is a certain amount of time, and one cannot completely know everyone's medical history in that short period of time, and parents are absolutely essential in getting accurate histories, and then also with the informed consent process. They may be able to chime in and say remember when your older sister had this thing done, remember she had this problem. They can try to explain things in terms and – that younger women can understand and that relate to their daily lives even better than the physicians can.

Q Now, Dr. Lemagie testified in this case that in her clinical practice she often found that minors misperceive what their parents' reaction is going to be when they found about – find out about an unwanted pregnancy, and basically that they misperceive it in thinking it's more negative. Do you agree with that opinion?

A Yes, I do. In fact, there's research that supports that out of Yale-New Haven as well, so both in clinical experience and in – in – in research studies it's been shown that teenagers don't accurately predict what their parents are going to react about for something like an unintended pregnancy.

Q Regarding medical history, is it important to get an accurate medical history before performing an abortion on a young girl this – 16 and under?

A Not only is it important, it's essential. Any surgeon will tell you that an accurate medical history is the key to knowing exactly what people's risks are during the surgery, as well as what their postoperative complications may be. So an accurate medical history is the core foundation of not only diagnosis of medical problems, but also in the treatment arena.

Q And is it important to get an accurate family medical history prior to performing an abortion on girls 16 and under?

A Family histories are also one of those areas where there can be surprising histories that are found out. There certainly can be genetic disorders which are really only diagnosable through an accurate family history, such as excessive bleeding problems or other siblings that may have had bleeding problems that a younger girl in the family may not even have been aware of.

Q Is it important to have a parent involved in providing an accurate medical history for the girl, as well as a family history, a medical history, prior to a girl being exposed to an abortion?

A Yes.

Q Explain to the Court why this is critical information and why it's invaluable to have a parent involved.

A Many times young women may not be very aware of what their own medical history is. For example, if a young woman has an allergy to Penicillin, which is a very common allergy of an antibiotic, they may not know that that's even their allergy, especially if they've been someone who's been well for a long time of their life and so haven't – hasn't needed to go to the doctor for antibiotics for many things. So Penicillin allergies may cause shortness of breath, it may cause the whole trachea to swell up, and young women can have severe anaphylactic allergic responses, and those kinds of pieces of information are very important for physicians treating any woman to have access to, and sometimes, and this is very common in – in young women, is they'll say, you know, I was allergic to some kind of medicine, my mom told me when I was a baby, but I – I don't know the name of it, or even when you probe them and say, well, could it be Penicillin, Erythromycin, they'll just say, you know, what, I don't know. And so something as simple as an allergy is very important, especially in the setting of abortion, because antibiotics are routinely used in modern abortion procedures and follow-up to reduce the risks of infection. So if I a physician can't pick the right kind of antibiotic to help a young girl reduce infections and not to be allergic to that, it really puts the abortion provider at a real disadvantage in terms of their desire to really do the best kind of medical care for young women.

Q And what areas should an abortion provider be looking at in trying to get information from a young girl's medical history from her that's important in delivering her a safe abortion?

A Well, the regular things, such as what medications they're on. Because many times anesthesia is used with abortions, they need to know if there are going to be drug interactions between medications a young woman may be taking. Allergies we talked – talked about. Medical history, does she have a history of a bleeding disorder like von Willebrand's disease. A lot of abortion providers wouldn't think that would be safe to do outside the hospital and may want to have other kinds of blood products available. Other histories may be that the provider themselves may not understand that a woman has had a prior abortion. Even a young woman may have had a prior abortion, which may increase her risk of having scarring at the site of the cervix or have other kinds of actual surgical complications before. We can just go on and on. There's – you know, every piece of what you expect from a history taking, in a full history taking of – of all issues will be important. In addition to that, you know, something that I've talked about and all the major medical professional organizations say, are that we should be absolutely screening for violence in young girls' lives, and, in fact, teens are at the highest risk of violence. So we need to be screening for physical assault and sexual assault of young women, because they're going to be put right back in the same situation, otherwise, if they have these histories and nothing's done about it. We have child abuse laws in every state in the nation that require health-care providers to make reports about suspec- suspicion of child abuse, not to actually prove that there is child abuse, but suspicion of child abuse, which also involves criminal sexual assault in many cases.

* * *

Q Now, do you think regarding the selection of a medical provider for an abortion, is the skill of that provider one of the major risk factors on whether or not there's going to be complications from an abortion?

A Yes, there is ample data in the literature that support that statement.

Q And regarding abortion providers, is this a major concern in finding a competent provider in that particular area?

A Yes. In fact, when you look at online abortion information services, many of the online services, websites, in fact, tell young – both – anyone who would just access the website please check local medical societies for the – you know, how – how – what the physician's malpractice record may be, if they are licensed, all those kinds of things. So actually a lot of the abortion sites where there's information about abortions have different questioning lines that you can ask for different providers, so that's on a lot of different websites around the country about what are the savvy questions to ask abortion providers, both for the physician and the facility as well, and – and those kinds of pieces of information are things that teenagers may find harder to access and understand, and parents can be very helpful in terms of trying to find out the reputation of different physicians in a community, or even as many – even something as simple as asking a pro-abortion provider how many of these do you do, do you do this full time or part time, do you do second-trimester abortions, how do we know what part of the pregnancy my daughter might be in. So parental involvement will be very helpful in – in trying to understand the right questions to ask as well.

Q Does an abortion provider have to be board certified in OB/GYN?

A No.

Q Do they even have to be an OB/GYN?

A No. Most abortion providers are not ob – obstetrician/gynecologists.

Q Do they have to be surgeons?

A No.

Q Do they have any minimal requirements besides an M.D. degree in – regarding – to be able to perform abortions?

A Not that I am aware of.

Q So a podiatrist could perform abortions, then, if she – if that podiatrist is an M.D.; is that correct?

A Yes.

Q So do you believe that it's important to have – or do you think that parents would be helpful and important to a young child 16 and under in seeking out and finding a competent doctor to perform the abortion?

A Yes.

Q Do you think that's critical pertaining to whether or not a girl is going to get a safe abortion?

A Yes.

* * *

A In terms of short-term medical complications, and I'll try to zoom through this fairly quickly and I'll just

move to the next few slides because there are all the short-term things, and, again, these are things that women should know about who are having this kind of surgical procedure, and these are things that I tell all the women that I'm doing D & C's on and other procedures like D & E's who have babies that have died, are things like bleeding, infection, including abscesses in the pelvis, damage to internal organs, including the uterus, the ureters, bowel injuries, bladder injuries, prolonged retention of fetal bones has been reported in the literature, fetal parts embolization, which is where little pieces of the baby actually get in the mother's bloodstream and can go to different parts of the woman and cause problems with her heart and lungs, postabortion septic pelvic thrombophlebitis, which are clots in the different vessels going into the pelvis, risk of blood transfusions. And then a lot of women don't realize how many times they need a second procedure. Even though the first time they had a procedure the – the abortion provider did the best job they could, they still either left tissue inside requiring a repeat dilatation and curettage – sometimes we have to actually look in a woman's belly in case there are instruments that have been pushed through their uterus, and sometimes we have to actually cut the woman open completely and look inside manually, which is called an exploratory laparotomy. And then occasionally when the situation is quite grave sometimes we actually have to perform a hysterectomy and take out the tubes and ovaries, which is, again, not as common, thank goodness, but would result in loss of fertility as well. And there can be – and these are all from actual case reports, but – ruptured ovarian cysts, ectopic or tubal pregnancies that weren't suspected or they were at the same time as an intrauterine pregnancy, and then

the heart and lung systems of women can collapse sometimes because of the medications given.

Finally, pain, problems with the placenta, where it grows in inappropriately into the uterus can be complications of the procedure and cause bleeding. DIC is a special coagulopathy or situation where a woman keeps bleeding and bleeding and bleeding and it's not easy to stop without special blood products. Some reports have shown that actually women have gotten hematomas near their brain. Asherman syndrome is a scar tissue that's in the uterus from the procedure itself. Embolization is meaning that either – the fluid around the baby can get to the other parts of the mom. Women can have seizures, and then there can be several cardiac problems, including endocarditis, which is an infection of the heart, an MI or myocardial infarction is especially more common in older women, valve replacement. Tetanus has been reported in the Third World quite a bit where there are no standard tetanus vaccination programs. And then the two other quite concerning ones are the risk of maternal death and the risk of a live baby after an abortion.

Q And where do you proceed then in your lecture?

A The next thing I talk about are the short-term medical complications for maternal, and – and that would be the – the most severe one is maternal death. So the CDC actually collects data on maternal death. However, it's not required to report. No one's required to report it. In general the CDC publishes maternal death data eight years behind when the actual death occurred, and so the accuracy of the data, because it's not mandatory, and the fact that there's such a huge lag time, doesn't really help clinicians in terms of looking at trends or seeing if certain

providers are – are unsafe. And we also know that usually CDC notification is greater than 12 months for half of all maternal deaths, so even when they do report it's so far removed from the situation that it's not – it's not as good data-wise for physicians to make decisions.

Also there have been just one study in the literature, which was actually quite remarkable, that showed how many – just with a sing – single sampling, that maternal deaths are grossly underreported, with 19 previously unreported deaths associated with abortions identified for a series of seven years. That doesn't actually sound like a lot, but considering the quoted maternal death rate is only one in a hundred thousand, and if there's about 1.2 abortions done on a given year, that's an average – that's 12 maternal deaths. So if you increase that by even one or two or three deaths, it actually increase the percentage of maternal deaths enormously, because the numerator is so small and denominator so big. So this kind of data is actually very essential in understanding maternal death data in the short term after abortion.

So moving on, we also know that women who are greater than age 40 have three times the rate of maternal death. Black women and min – minorities have 2-½ times the rate of maternal death, and women who have abortions over 16 weeks of gestation have a 15 times risk of maternal mortality. So this is the kind of data I'm talking about with teenagers who delay their care having much higher rates of mortality as well. In addition, there are lists on the Web in different situations where they actually pull maternal death data from newspapers, and that's not even reported to CDC. So you can actually sometimes do better looking through newspapers in American [sic] to find out who's died from abortions than actually asking

the government, which is – is quite a bit a problem. And that – all that data I talked about does not even include the maternal suicide data which has been around since 1996.

I'm just going to move on. The – for anesthesia-related complications we know that if women undergo general anesthesia they have a 2-½ times greater risk of death than if they have local anesthesia, and that even women who have the lowest risk kind of profiles, meaning a healthy heart and no major medical problems, still probably have a one in a hundred thousand risk of dying. So that tell [sic] us that, in fact, our – our death data is very low in terms of what's reported to the CDC, and we – we knew that before 1977 infection and hemorrhage were the leading causes of death, and now we know that anesthesia complications is probably the leading cause of death. So when women undergo general anesthesia there's higher rates of hemorrhaging, almost 4-½ times, and all complications almost double when general anesthesia is used instead of – of not used. So those are the kinds of things that – that women need to be aware about when they're making choices of not just to have an abortion, but what kind of anesthesia they need to have or – or don't need to had [sic].

Q All right, and that – does that summarize, basically, the short-term abortion risks we're talking about?

A Right, so those are the short-term medical compli-___. cations of abortion.

Q And then you go into in your lecture to the medical students and the doctors long-term medical complications from abortions that they should be aware of?

A Yes, long-term medical complications are the things that are actually harder to figure out in terms of wher you read the literature, and also when you look at what the American College of Obstetricians and Gynecologists says, and, in fact, when you look at abortion provider technical manuals, which are supposed to tell providers exactly what's the state-of-the-art information, these are the things that are difficult to glean, but if you actually go to the literature itself, which I have done, we found that breast cancer is higher in women who choose abortion. There are several pregnancy-related issues that are higher. Some studies show more of an effect than others in ter – in terms of ectopic pregnancies, placenta previa, where the placenta, which is the connection of mom and baby, grows over the cervix. It necessitates surgical intervention such as a C-section. There can be infertility, fetal loss in terms of preterm deliveries, low-birth-weight babies. That – we know that when we don't screen for child sexual assault, that that continues. Many times we put children right back in the same situation, and so the long-term complications of that then continue to go on unabated, and then the most sort of shocking and · and newer data is about maternal suicide in the year following abortion.

So in terms of the long-term medical complications for breast cancer, the slides you see here are ones that I've used for awhile, but when I did my new literature review I'm going to add one more thing. You have it in – in the exhibit of my preprint of my paper. But breast cancers increase for two reasons. One is women do not have the full protective effect of a full-term pregnancy to prevent further breast cancer, and this is true if a woman has a full-term pregnancy before they're age 35. That's a protective effect

against breast cancer, and you lose that when you have an abortion instead of a – a full-term pregnancy.

And then a second effect is an independent effect which is seen regardless of a full-term pregnancy or not, but a woman undergoes an induced abortion, there's an independent effect of increasing of breast cancer risk, and that was seen by both Dr. Brind and myself. Dr. Brind's publication showed an odds ratio of 1.3, meaning about approximately a 30-percent increased risk, and mine was on the same magnitude, and this would be whether a woman had the abortion at any time in their reproductive lives, or if they had the abortion before a first full-term pregnancy the numbers were slightly higher. So breast cancer has certainly been a controversial long-term effect, but I think with the new paper you're going to find out that it seems a lot less controversial.

Other pregnancy-related long-term medical complications include two papers that show an increased risk of ectopic or tubal pregnancy. That is actually a kind of pregnancy that puts a woman at risk for maternal death, because of [sic] a tubal pregnancy ruptures inside a woman they can hemorrhage to death, and that still happens across American [sic]. In the year 2003 women still die from undiagnosed ectopic pregnancies, but when women have one or two or more induced abortions the – their rates of tubal pregnancy are higher in some studies, and I quote two of the studies of that.

The other thing you'll find in my slides is when I have given this talk in the past I use the – the book – it's called A Clinician's Guide to Medical and Surgical Abortion, and that's also referenced in some of my other studies. That book is considered – well, I call the bible for abortion

providers. That's what most abortion providers rely on for the most up-to-date information about how to do abortions, what the complications of abortions are, and it turns out that a lot of the studies that I quote throughout this paper don't even show up in that book, so that there's an omission of data even to the people who are supposed to be providing the abortions in a safe and – and expertise kind of way. So if you see a few of these mentioned, it's because they're not mentioned in what you'd consider – the big professors in the country who – who know how to teach this material the best, they decide not to include this kind of material in their books.

The other long-term medical complications include the placenta previa, which I've sho – which I discussed. In fact, all of the different studies have shown an increased rate of placenta previa. That doesn't surprise a lot of people, because when the cervix is opened there can be some damage around where the cervix is opened in the uterus and there can be scar tissue and – and it may make it so that the placenta doesn't appropriately implant in the uterus in the right places. So three or – three different studies have shown this increased risk.

There have been a couple studies that show secondary infertility increases when a woman has an induced abortion, and some – there are other studies that have not shown that, so I try to present the data that – that – that shows that in – in the literature. In the new paper, however, we show all the ones. We did a whole new literature search.

Finally, both preterm delivery or subsequent fetal loss is increased as a long-term medical complication, and low birth weight, which is also a marker for preterm delivery,

is higher in women who've had induced abortions. So what that means is that we can see that women who decide to abort their babies may have a very early birth for the next one. This incurs higher risk and neonatal intensive care units, and – and surprises many women who may have thought that they weren't at higher risk because no one had told them about that.

The last two long-term medical complications is that unreported – if – if girls and children are not screened for sexual assault, they do not have the protections of the state, and they will go right back to the situations that will force them to get – have risk of being pregnant again. So the – the new analysis, this has been published since I wrote it on here, but Maureen Phipps, Dr. Phipps, was at the University of Michigan as a Robert Wood Johnson fellow in the year 2000, and she has gleaned the data from the CDC and showed that as a group teens under 15 have the highest abortion ratio. That's just straight off the CDC. And the '96 data analysis shows that 58 percent of these teens are probably pregnant from incest or rape. So by not screening the very youngest of the girls we're missing these girls having been raped and incestuously abused. So we know that – this is nothing new, but health care providers, which do include abortion providers, should be reporting suspected child sexual assault, and that has not been happening as a rule.

Finally, long-term medical complications include maternal suicide. In 1996 there was a Finnish study by Gissler showing that women who underwent induced abortion in fact had a six times higher rate of killing themselves in the year after their abortion did the – compared to the women who actually went to term. So compared to other women who were never pregnant it was

three times higher, and compared to women who had a full-term pregnancy it was six times higher. So that was shocking data. It was not included in the guide to clinicians – the Guide to Medical and Surgical Abortion, even though that book was published in 1999 and the study was out in 1996. So it – it draws concern about that.

In addition, there have been data now in America about the increased rate of both suicide and also homicide in women who've had induced abortions, that there actually – deaths from all causes that are violent are much higher in women who've had induced abortions, and suicide risk is of the same level, which is about three times higher, and this is from California data and medical records, and these are numbers that are not small. These are numbers where we look at 170,000 women and we see a threefold increase risk.

Finally, the psychological complications include that we have harder times understanding the psychological part in terms of rates of depression, in rates of different diagnoses, but the easier part of that are how do we count numbers better. So the two areas we can look at numbers very well is looking at how many women are actually admitted to the hospital under psychiatric diagnoses, which is an actual hard number, and the second thing is how many women actually have depression which can be measured by scales. So psychiatric admissions are higher for women who've had abortions, and there are two studies I quote on that, and also other diagnoses such as psychosis are higher.

* * *

Q And at that time – during her testimony did she state: It appears that women who have full-term pregnancies

have an increased risk of breast cancer for some time after that pregnancy?

A Yes.

Q Is that an accurate statement?

A It's misleading.

Q Explain to the Court why this is a misleading statement?

A There have been several studies since 1970 showing that a first full-term pregnancy before age 35 actually gives a protective effect against breast cancer. That's been established by McMahon starting in 1970. This is part of – the National Cancer Institute has adopted this as what we understand about breast cancer. So what Dr. Palmer said was actually in complete opposition to what's been established and is accepted by the medical community in terms of risk factors or protective effects about breast cancer. She said the opposite.

Q And so from a standpoint – when a woman has a pregnancy she – and – she does not have an increased risk of developing breast cancer from having a pregnancy; is that correct? From your understanding of the literature.

A That's corr – correct, that there is a protective effect of a first full-term pregnancy, especially before age 35, in reducing breast cancer, yes.

* * *

Q And, Doctor, based upon your research and your interviews with your colleagues, have you formulated opinions regarding the quality of care that these girls get when they go to abortion clinics?

A Yes.

Q And can you tell us what your findings are and what your opinion is in that area?

A When I ask my colleagues how much time they spend taking histories and doing physicals before procedures are done on people, I've noted that there seems to be great divergency in what's done in a surgery clinic or an obstetrics and gynecology clinic prior to surgery, and what's done in an abortion clinic prior to surgery. For example, it's standard practice around the country for most of the time for the actual surgeon doing a procedure to take a history and perform a physical exam and, in fact, go over the informed consent for a procedure with a patient directly. Now, sometimes that's done in a teaching situation where an attending doctor or faculty doctor will supervise a resident doctor in these situations, but in general most surgery is actually performed by a surgeon who has a prior relationship with the patient and who's gotten to know their history and physical over a period of an office visit, and whose nurses also participate in explaining the procedure as well, so it's a team approach, but the head of the team is the surgeon themselves.

At the abortion clinics it seems from talking to the actual providers, from looking through data on what women who've experienced abortion had to say and, you know, looking at quality assurance data, that it seems to be that the standard is not that the surgeon actually does the history and the physical and the consent for procedures, but, in fact, that the abortion surgeon merely reviews briefly what others have taken as a history, a physical, if there is a physical done, and what the consent may have had, so that the surgeon in this case doesn't

have the same kind of familiarity with the person – of the person who's there. They just don't really get to see them face to face before the procedure.

* * *

Q Besides the counseling services, do you – does your research reveal any concerns about the aftercare and postprocedure follow-ups that abortion clinics follow?

A Well, what was also very odd about the abortion counselor is that, in fact, they're supposed to sometimes be present during the procedure itself, and then to go over what the postabortion complications might be or go over different kinds of postoperative issues, both in the center itself that performs the abortion, as well as answering the phones later on.

Q And regarding the procedures they have as to follow-up with patients after they receive the abortion, did you find any areas of concern in that area?

A Well, it turns out that most – whether they're young girls or – or older women, most women don't go back to their abortion providers for care. In fact, 30 percent or less do. And it turns out even when it's not abortion care, young teenagers rarely follow through on medical advice when it's given, and there's good data in that in the medical literature as well, whether it's applying to abortion or not, in terms of teenagers.

* * *

Q Doctor, in your opinion does abortion carry a greater or less – or not a – less risk regarding mental health after delivery? Mental health of the child.

A Oh, the – especially looking at the suicide data, it's much less in terms of mental health effects on a woman who goes to term than someone who aborts their pregnancy, but also when you look at depression, posttraumatic events, et cetera, and psychiatric admissions, all those point that a term childbirth is much more protective of mental health than – than abortion is.

Q And you cite in your expert report the Gissler study; is that correct?

A That's one of them, yes.

Q And what does the Gissler study show?

A Gissler, to remind everyone, was a 1996 study that showed as compared to women who go to term, women who abort their pregnancies have a six times greater chance of suicide in the year after that decision, and it's three times greater than the general population of suicide rate for women who abort their pregnancies.

Q Doctor, in treating postabortion complications, in your practice do you require parental consent or is it required for parental consent before you can get postabortion complication treatments to a minor?

A Yes, we can – if – if a child's the one who's receiving the care, children need to be – you know, children's surgery has to have parental consent; that's correct.

* * *

Q Counsel referred to the American Cancer Society's position regarding the – this – their position that there was no risk – insufficient evidence at this time to find a risk regarding abortion and cancer. The question I have, is

that position that they stated, that is a position that was before the NCI's recent change in position on that; is that correct?

A That's right. All the big organizations are now changing their positions because of this data that's come out, not my personal data, but just the other data in the literature.

Q And the American Cancer Society does risk – list as a risk factor the protective effect of a first pregnancy; is that correct?

A That's correct. People have to remember that the whole point of this breast cancer abortion thing is there's two mechanisms, one that is completely undisputed, and that's that a full-term pregnancy reduces the risk of breast cancer later in life if it's before age 35, and the second part – this is all the controversy kind of stuff going on – is this independent effect of induced abortion giving slightly higher rates of breast cancer. So there's two effects. Women need to know about both the effects, and – and the more controversial one is – is – has lower numbers, basically.

TESTIMONY OF DR. STOTLAND

Q And does your opinion – does that mean that you believe that parental involvement in a minor's decision whether to have an abortion is a bad thing?

A No.

Q Can you explain that?

A Well, if – what seems to be most helpful to people is if they can consult with the people they think will be most helpful to them, and for most adolescents, most minors, the – their parents are those people, and their parents can be extremely helpful to them in making decision and in carrying it out.

Q Do you think that encouraging parental involvement is helpful to a minor considering an abortion?

A Yes.

Q Okay, and do you think that the law – the Alaska parental consent act encourages minors to consult their parents for an abortion?

A Well, it requires them to get their parents consent. It doesn't say anything about what kind of conversation there is or whether the parents, you know, are helpful. It simply allows the parents to veto the decision if they wish to.

* * *

Q Okay. If you'll look at the last paragraph, Dr. Stotland, isn't it correct that Dr. Adler says: Although women in general show few adverse effects of abortion, it is possible that adolescents are at increased risk compared with adult women, and that their risk is great enough to require added protection.

A Are you asking me whether I agree with that?

Q Well, first of all, you see what I'm talking about here?

A Yes, yes.

Q And you acknowledge, then, that's Dr. Adler's opinion at the time she wrote this article. . . .

A Yes.

Q . . . . correct?

A That it was possible.

Q Correct. And do you agree with that?

A Many things are possible. I think if you look at the whole article you'll see that she doesn't think it's very likely, but it's possible, and I think it's part of good science, quite often, to allow that many things are possible, and to have an open mind.

Q Doctor, do you agree, also, that Dr. Adler said more research is needed on adolescent competence and decision making? And I refer you to page 294.

A That's another thing that's said in almost every scientific article, that more research is needed.

Q Okay. Dr. Stotland, it's your opinion, then, that more research is not needed on the psychological consequences of abortion or the psy – the ability of minors to make abortion decisions?

A Well, I have to answer that – I have to give two answers to that. One is it's always advisable to have more research on important issues, but I think there's enough of a body of – and – and also it depends for what purpose. For purposes of making social policy or laws now I think there's enough evidence to make decisions about that, but of course it's always useful to have more research.

Q Doctor, isn't it correct you were willing to make decision about that back in 1991 when you testified in California with the state of the research at that point, correct?

A I was willing to – I was willing to do what exactly? I'm not sure. . . .

Q Well, Doctor, you. . . .

A . . . . what you're asking me.

Q . . . . gave an opinion that the California parental involvement law was contrary to the best interests of minors in that state, correct?

A I would have to look at my testimony, but yes, that's probably what I testified.

Q All right. And you testified about that based on the state of the science on the psychological consequences to minors of abortion and the decision-making ability of minors to decide abortion as it existed back prior to 1991; is that correct?

A That isn't the only basis I – for my opinion, but it was that time, and that's as much scientific evidence that – as we had at that time.

Q Okay. Doctor, getting back to the necessity for a minor facing an abortion decision to have strong social support, you agree, do you not, that most often it's that minor's parents who can provide that kind of social support?

A Yes, I agree.

* * *

Q Okay. On page 780 where it says relations among outcomes, I believe you said that – and please correct me if I'm wrong – that most of these – in this sample most of these women were neither dissatisfied with their abortion decision or depressed two years later.

A Yeah, 6.2 percent were both dissatisfied and clinically depressed, and 65 percent were neither depressed nor dissatisfied.

Q Okay. So the 6.2 percent dealt with those who are both unhappy with their abortion decision and also depressed, correct?

A Yes.

Q All right. So we can conclude from that, can we not, that 35 percent of this sample were either dissatisfied with their abortion decision or depressed two years later, correct?

A Yes.

Q Okay. And is it correct that Dr. Major found that of her sample 17 percent had suffered postabortion medical complications, including abnormal bleeding and pelvic infection?

A Seventeen percent reported that they had, yes.

Q Okay. And do you believe they had any reason to not tell the truth?

A Well, I don't know what kind of bleeding, for example, they expected, so what is meant by abnormal bleeding may be more than a menstrual period, or whether they meant more than is normal after an abortion, so they

just might not have – I don't know what degree of information they had.

Q Okay. And, Doctor, isn't it correct that Dr. Major found younger women evaluated their abortions more negatively?

A Yes.

Q Okay. And if you look at page 781, which is the next page, and I think you testified about this, would you agree that the study found that one percent of this sample had posttraumatic stress syndrome associated with abortion? Is that her finding?

A Yes.

Q Okay. Now, isn't it correct that you don't agree with this finding?

A No, it's. . . .

Q Okay.

A . . . . not correct.

Q All right. Doctor, is it your opinion that abortion does not cause posttraumatic stress syndrome in any woman?

A They – associated with isn't' the same as caused by, and it also depends on the – on circumstances of the abortion. I can certainly envision, and I know of abortions performed under circumstances that would cause or be a possible precipitant of PTSD.

Q Okay. Doctor, if it were true that this one percent was due to the abortion, would you be concerned for those patients?

A I'm concerned for anybody who has a disorder.

Q Okay. So you would consider it significant, then, a finding that one percent of the abortion patients in a sample this size had posttraumatic stress syndrome associated with the abortion.

A Well, I – what do you mean by significant?

Q Well, Doctor, isn't it correct that Dr. Major found it significant enough to put this statement in her study?

A Yeah, and she – in – in the context of comparing it with the rate in the general population, which was 10 times as great.

Q Uh-huh. But none of those in the general population she was talking about were not the people who had abortions in her sample, right?

A The – the general population is the general population that's been done in – determined in population studies, so we don't know whether they – what – what they were – what the trauma was that precipitated their PTSD. Many people who have abortions or people who have – among people who have abortions the rate of victimization and violence having had – being the victim of violence and other forms of abuse is higher than in the general population, and – and those things predispose to PTSD, and having a previous PTSD pre – predisposes to having more PTSD. So if you mean by significant that I would think that abortion in general leads to PTSD, both what I've just cited and the fact that it's much less than in the general population wouldn't lead me to think that it's significant in terms of a cause of morbidity among women contemplating abortion or having abortion.

Q Okay. Doctor, isn't this statement in Dr. Major's study consistent with the conclusion that one percent of her sample had PTSD because they had the abortion, whereas the general population of women in this age group not having had abortions had a higher rate?

A No, they're a lot – first of all, she says associated with. She doesn't say caused by. Secondly, we don't know – many women in the general population have had abortions, so. . . .

Q Okay, well, Doctor, isn't it correct that Dr. Major – we'll quit with the semantics in a moment, but – that had she meant that the PTSD wasn't due to the abortion, she could have said PTSD after – when tested after having had an abortion?

A She could have said that.

Q Okay. Doctor, is it correct from this study that 16.3 percent of these young women from 19 on down were dissatisfied with their decision to have an abortion when they were contacted two years later?

A Yes.

Q Okay. Is it correct, also, that 19 percent of this sample said they would not make that kind of a decision again?

A They would not make the same decision again. . . .

Q Okay.

A . . . . yes.

Q And is it also correct that Dr. Major found that over time the negative emotions increased and decision satisfaction decreased?

A That's what it says.

Q Okay. And does she also say that although sadness and regret are not psychological disorders, these feelings should not be dismissed; is that correct?

A Yes.

Q Do you agree with that?

A As long as we understand that that has to be compared with the other possibilities, the other choices these women could have made at the time. We don't know.

Q Dr. Stotland, is it correct that Dr. Major concluded as well that the data in her study did not address truly long-term adjustment to abortion, and suggested that studies at the five- to 10-year postabortion stage would be useful?

A Are you asking me whether she said that?

Q Yeah. Page 783.

A Yes.

Q Okay. And you agree with that?

A Well, the problem is that there's so many intervening things that happen to people over five or 10 years that it becomes really impossible to determine what they're due to, and so I've seen that often in the literature and it's often something that we say about various sequelae, but I don't know that at 10 years we would know how much of a person's state to attribute to an abortion and – and how

much to attribute to the thousands of other things that have happened to them in that interval.

Q So your answer is you don't agree with her.

A Well, she says more women may have experienced intervening events, so – but. . . .

Q She says abortion. . . .

A . . . . I agree that – that the data don't address five through 10 years adjustment – adjustment five or 10 years later. Yes, I agree with that.

Q Doctor, you would agree, would you not, that a woman having had an abortion, especially as an adolescent, might have some emotional trauma at the five-to-10-year range due to the abortion?

A Might?

Q Sure.

A Yes, might.

* * *

Q Okay. Well, Doctor, whether or not the abortion itself is what trips the trigger for a suicide attempt, would you not agree that a minor who's living at home, 16 or younger, that her parents are probably her best defense against a suicide?

A Defense against a suicide. I'm trying to think of – we've had several initiatives about adolescent suicide, but I can't remember anything ever being framed that way, and, in fact, we're working very hard in the American Psychiatric Association and the National Mental Health Association to get parents to be more aware of the possibility

of suicidality in their children, so that would say to me that parents aren't aware as much as they might be, but whether they're better than other possible sources, probably on average.

Q Well, Doctor, if a secret abortion, that is, one that's held from the parent – well, let me withdraw that and ask this. If parents know that their child has had an abortion, are they in a position to monitor that child for both physical and emotional consequences?

A Yes.

Q Okay. If they don't know that she's had an abortion, are they in the same position?

A Well, they could certainly and ought to be monitoring their child's physical and psychological well-being, but they wouldn't know that particular procedure had happened, and to. . . .

Q And isn't it correct that because of your position on this law you don't think it's particularly important that parents do know?

A No, that's not true.

TESTIMONY OF DR. RICHEY

Q And you don't have any concerns that perhaps a girl as young as 11 year [sic] old might not really be able to give an intelligent, informed consent for that procedure. You have no concerns about that.

A I have concerns about everybody being able to give informed consent, to make sure that the consent is informed

before I do anything, regardless of the age of the person and. . . .

Q Well, you would agree, Doctor, that some girls in this age range are not capable of giving informed consent, would you not agree – would you agree to that?

A Yes, and there are some people that are 25 that are not capable of giving informed consent because they don't understand the issues involved.

Q And you agree there are no medical studies showing that 16 and – girls and under can give informed consent, are you?

A Not specifically aware of – of studies directed at that population.

Q And do you think that it's beneficial to have parents involved in getting informed consent from girls of this age?

A Yes.

Q When a parent is present when you're administering prenatal care do you ask the parent about – questions about the child's medical history?

A I try really hard to direct all my questions about the pregnancy to the patient. It's – I consider it to be pretty rude to ha – to talk to the parents about the patient when the patient is the patient. I talk to her, and if the parents interject something that's fine, or if I ask the patient a question and the patient doesn't feel comfortable answering the – or I sense that she doesn't feel comfortable answering the question with the patient – with the

parents there, then I occasionally will ask the parents to step out and I'll talk to the patient by – by herself.

* * *

Q In situations where a minor makes a prenatal choice that endangers her health, Doctor, you always try to involve and get the parents involved in that decision, do you not?

A Yes.

Q In fact, I believe in your deposition you couldn't think of a situation of when you didn't get the parents involved when that type of situation had arose.

A Again, getting the parents involved is – is – I guess that's the way you want to put it. It's a matter of semantics. But the – the parents are involved. The – me specifically going out and involving a parent would happen if the patient was not in – you know, telling the parents what was going on and, for example, the patient wanted to do something that would – that would endanger her life and there were – the parents had been involved, then I would ask her permission to discuss that decision with her parents, yes.

Q And I think you do this because you believe there's some benefit in having parents influencing their daughters to do what's in their. . . .

A Absolutely.

Q . . . . best interest.

A I think parent support of their – a supportive parent is extremely helpful in managing a pregnancy, yes.

Q Do you think we need to have a law which allows parents to force children to have abortions when it's medically necessary?

A No.

Q In fact, in – the situation is that in most all – in most situations when you get parents involved they're going to be able to convince the child to act in their best interest and follow procedures you recommend; hasn't that been your experience?

A In – in some. In – I can – I guess probably most. I don't know the exact number. In some cir – circumstances the parents are urging their – their patients to make a decision that I would consider to be the less optimal decision.

* * *

Q And you agree, Doctor, that good prenatal care is always in the best interest of a child, isn't it?

A Yes, I would agree with that.

Q And you agree that abortion may or may not be in the best interest of a child.

A Yes.

Q If your own 14-year-old daughter was pregnant, would you want to know about that, Doctor?

A Uh-huh.

Q If she was seeking an abortion, would you want to know about that?

A Sure.

Q And you agree, Doctor, that girls in this age range, 16 and under, are more impulsive and make more impulsive decisions than adults; isn't that true?

A No, I don't agree with that at all.

Q Doctor, I bring to your attention transcript, page 47, all right?

UNIDENTIFIED SPEAKER: I don't think she has a copy of it.

MR. DAVIS: Well, don't worry, she'll have it in a minute.

A Is – it's not. . . .

Q Doctor. . . .

A Where are we at?

Q Just one moment, let me find the reference. It's page 49. Doctor, this is the question that was asked you: Do you have an opinion as to whether minors are more likely than adults to engage in impulsive behavior, generally?

Answer: I'd say in general, yes.

A Again, you're talking about impulsive behavior in general as opposed to impulsive behavior specifically. You know, there's impulsive behavior – I've – I mean, in regards to decision making about an abortion. You also specifically asked me about impulsive behavior, do these patients make these incisions – decisions impulsively, and I told you that they are not allowed in my practice to make them impulsively.

Q Well, the question I asked and going back to this way, that minors are – tend to be more impulsive than adults, and you agree with that. . . .

A In a lot. . . .

Q . . . . general. . . .

A . . . . of areas, yes.

Q Okay. And do you think it's important in your 14-year-old daughter when she's pregnant, seeking abortion, that you get involved in selecting the person who is going to do that procedure?

A I'd want to be, yes.

Q And you would want to ensure that she is provided the most experienced doctor and most competent doctor in exercising that procedure; is that. . . .

A That's. . . .

Q . . . . correct?

A . . . . correct.

Q And you recognize, Doctor, there's difference in quality and talent between one doctor from another in performing procedures; is that correct?

A Correct.

Q Now, you are expert in ultrasound, are you not? I mean, that's one of your fields?

A Yes, sir.

Q Now, the other doctor who's well known in this field is Dr. Isada; is that correct?

A Uh-huh.

Q And you know him quite well. And do you. . . .

A Uh-huh.

Q . . . . think he's quite competent?

A Uh-huh.

Q And do you and Dr. Isada agree that when you're performing D & E abortion procedures you should always use ultrasound to make sure that you don't have any components left over after the abortion?

A No.

Q So you don't – you would not agree with Dr. Isada in that position.

A No.

Q Right. You understand that doctors disagree in this area?

A Yes.

Q And you're one of the doctors that is of opinion that it's not necessary, while Dr. Isada believes it's necessary.

A Well, I think it depends on the situation. Again, it – it depends on the gestational age you're discussing, it depends on the particular pregnancy, the uterine complications. It depends on the experience of the person providing the abortion. There are a lot of people that perform D & E's without ultrasound guidance, and traditionally they are performed without ultrasound guidance and they are performed very safely without ultrasound guidance. Other

people that have used ultrasound exclusively – for example, Dr. Isada – don't feel comfortable doing them without an ultrasound, and in his case he should do one with an ultrasound because he doesn't feel comfortable doing them without one. For those providers who are trained to do them without one and feel comfortable doing them without one, then I think they're perfectly capable of doing them without one.

Q So even the top doctors in the field in this area in Alaska, which are you and Dr. Isada, can disagree on what's necessary for – in order to have a safe abortion; isn't that correct?

A I guess that's probably true.

Q So you can understand and you agree that the selection of who the abortion provider is is an important decision as far as the patient is concerned.

A Uh-huh.

Q And, Doctor, your 14-year-old daughter, would you also want to know if she was engaging in unprotected sex?

A Absolutely.

Q And you would want to counsel her about the dangers of STDs and potentials of being pregnant again, right?

A I would already have.

Q Right. And you agree that in dealing with girls of this age they often need to be told more than once; is that correct?

A Absolutely.

Q And, Doctor, if your 14-year-old daughter was being abused by an adult boyfriend, in other words, having sexual relations with an adult boyfriend, you would want to know about that, too, wouldn't you?

A Sure.

Q And you'd want to try to stop that, wouldn't you?

A And I would prosecute him.

* * *

THE COURT: We're back on record. Cross-examination continued.

MR. DAVIS: Thank you, Your Honor.

Q Doctor, you would agree, would you not, that it's in the best interest of a minor to have a caring parent monitoring for postoperative care for abortions?

A A supportive parent, yes.

Q And you agree that minors tend to delay abortion decisions; is that correct?

A Sometimes, yes.

Q And this is from the fact of their inexperience, and also the problems with denial; isn't that correct?

A Sometimes, yes.

Q And you'd agree that the longer the delays, the more likely there will be complications; is that correct? In the abortion.

A That's correct.

Q And the more likely there are going to be complications, the more the need for parental assistance in monitoring those complications; you would agree to that, right?

A The – the need for monitoring increases, yes. Whether it's parental or otherwise is. . . .

Q Regarding this. . . .

A . . . . depends on the parent.

Q Finished?

A Yeah. I just said depends on the parent.

TESTIMONY OF JUDGE MARTIN

Q What is your current position?

A District court judge in Minnesota.

Q Okay.

A Off – office in Duluth, Minnesota.

Q And how long have you been a district court judge?

A Twenty-four years.

Q And what types of cases are you responsible for?

A Well, I've presided over juvenile court throughout that time. I also do probate. I've done a lot of family court.

Q Okay. And prior to becoming a judge how were you employed?

A I was a legal aid attorney for about eight years.

Q And what types of cases were you responsible for as a legal aid attorney?

A All types of civil cases, but it included a huge number of divorce cases, landlord-tenant, bankruptcy, creditor problems, things like that.

Q And what is your educational background?

A Well, I graduated from college and law school.

Q And where did you attend college and law school?

A Oh, I went to Princeton University for college and Yale Law School.

Q Okay. And in your duties as a district court judge do you have occasion to interact with minors seeking abortions?

A Yes, I do.

Q And in what capacity do you interact with these minors?

A Well, I preside over – well, almost all of the judicial bypass proceedings.

* * *

Q Okay, and when the minors tell you either that they've been subject to abuse or they fear abuse, what do you understand abuse to mean?

A Well, I'll ask them – I mean, if they just the word abuse I'll ask them what they mean by that. I'll ask them what's happened and – and it might be physical, it might be emotional abuse, it might – you know, they'll go into

some details about what occurred. They'll – and I'll ask them if they have fear about what might happen, I'll ask them, well, why do you think your parent would – how do you know your parent won't be comforting and offer you some support and advice and maybe they'll be in your corner, and why don't you – why do you feel that it's not worth the risk? I mean, maybe it'll turn out just beautifully and – you know, I'll ask them questions like that. The – then I'll ask them about their plans for the future. . . .

Q Okay.

A . . . . where they are in school, what they intend to do in their future, do they intend to go on to secondary school is what they'll be talking about, or they'll be talking about their employment. Some of them work already some of them have plans for a future career. I'll ask them how the pregnancy might fit in if they carry to term, can't they fulfill some of those goals or whatever. We'll go into the future a little bit to see if they're [sic] considered that as a mature person would do. And that's about – I think that's about the outline of the questioning.

Q Okay, and do the minors often tell you that their future plans are one of the reasons why they want to have an abortion?

A Yes, they've – they almost all want to go to secondary education, whether it be vocational or college. They have careers in mind that they're dreaming of. They – and they – they're convinced in their own mind that there's no way that they could carry to term, have a child and still pursue these – these plans.

TESTIMONY OF DR. WHITEFIELD

Q What is the youngest patient that you've had that has been sexually active?

A The only one that I can remember specifically for me is – is a 12-year-old that I delivered a baby to. I – I remember the situation because it was unusual. I delivered this 12-year-old who had a child, and her mother was with her, who was 24, and her grandmother was with her, who was 37, and it struck of the 13-year, 12-year, 12-year relationship between these two. It was just sort of the numbers that rung in my head. That's one of the reasons I remember that one.

Q And what is the youngest abortion patient that you can recall?

A I personally can't put a number on that. I know that I've looked at our clinic statistics for the clinic as a group, but I can't put a number on that for me.

Q And what about the clinic as a group?

A I believe our statistics show that the youngest person we performed an abortion on was 12.

* * *

Q All right. Now, I'd like to ask you some questions about your experience with parental involvement with your minor patients who come in for care. Do minors typically have a parent accompany them to your office?

A Many minors will come with parents.

Q And do you feel like you can put a percentage on that at all?

A This question was asked in my deposition previously, and I'll give the same answer I gave then because it's the best way I can give. Prior to coming to one of my depositions I asked the members of my group if they could try to put a number on the patients who presented for pregnancy terminations who may have a parental accompaniment, and the number was approximately 50 to 60 percent. I've not really thought about that issue in terms of people who come for nonpregnancy-related events.

Q Okay. And do your minor patients ever come with an adult other than a parent?

A Yes.

Q And what – who have those people been? Can you just give the Court an idea?

A A broad spectrum of people. It could be a grandmother. It could be an aunt. It could be their friend. It could be a supportive friend. It's almost impossible to tell.

Q Okay. And do you routinely talk to your patients that don't come with a parent about why the parent hasn't come?

A I don't necessarily ask why the parent hasn't come. I assume that the person who's come has made a decision to involve them or not, and that's the patient's choice.

* * *

Q Okay. And I'd like to focus now on the first trimester surgical abortions. Is it fair to say that that is the majority of abortions that are performed at Alaska Women's Health Services?

A Yes.

Q Now, how many days does it take for that procedure?

A It can be done either as a one-day procedure or a two-day procedure.

Q Okay, can you tell the Court when you would do it as a one-day procedure and when you would do it normally as a two-day procedure?

A The – the key to successfully completing a procedure with minimal complications is trying to ensure that the cervix is dilated as atraumatically or as easily as possible. In a person who's had several children vaginally it's pretty easy to dilate the cervix. In a person who is very early in pregnancy the cervix doesn't have to be dilated very much. So we try to isolate one-day procedures predominantly to the people who are early in pregnancy, who have had a number of vaginal births. That minimizes the trauma to the cervix. In people who are either further along in the first trimester or have not had any vaginal births, then we would try to do that as a two-day procedure and use passive cervical dilation with Laminaria to more atraumatically dilate the cervix from the first to the second day.

Q And what is Laminaria and how does that work?

A Laminaria is a – literally a piece of seaweed. It comes from the plant name Laminaria japuncum (ph), and the Japanese are the people who perfected this technique, and this piece of seaweed is taken and sterilized and dried, and then the day prior to the pregnancy termination the Laminaria is put inside the patient's cervix. Now, much like a sponge which is dry which absorbs moisture and expands, the Laminaria can absorb moisture from the

cervical os of a patient, and over a time period slowly expand, and it's felt that a slow dilation of the cervix is more atraumatic than a rapid dilation of the cervix.

Q Based on what you've said, Doctor, is it fair to conclude that most of your minor patients you would want to do a two-day procedure on?

A Yes.

Q All right. Now, I'd like to focus. . . .

A The rea – the reason I say that – that's true, and the reason I say it is because most of the minor patients haven't had a vaginal birth, but if I had a minor patient that had several children, then that person may be an exception.

A – I saw a woman last week who was 19 who was having her sixth child. That would be a person whose cervix would be easy to dilate.

Q Okay. I'd like to now go through the process that a patient would go through when they come to your facility for an abortion. First of all, is there a difference between the process for minors compared to adult women?

A No.

* * *

Q Are there any medical conditions that you've encountered that have prevented you from doing an abortion?

A Absolutely prevented me? No. By and large, if a person has a medical condition that would make abortion a significant risk, it will clearly make pregnancy a risk, too. I mean, carrying a pregnancy to term is by and large

going to be more of a problem for the patient than the pregnancy termination.

Q All right. Now, after you obtain a medical history from a woman who's coming in for a termination what would be the next step for her in the process?

A After a history is obtained then the – there's two steps which can occur almost interchangeably. One step is that all patients who – and we're speaking now of first-trimester abortions in my office.

Q Yes.

A The person may get an ultra – well, will, not may – will get an ultrasound done to confirm where in pregnancy they are. That's to ensure that a person's either further along than we think they are or earlier than we think they are, or that they have an ectopic, which would be a whole different issue. That's one step, ultrasound. Second step would be looking at a general short video that we have regarding a pregnancy termination and what to expect and what sort of the issues are around pregnancy termination. Those two steps can be done sort of in any order.

Q Okay. Let me ask you about the video first, then. What – what's on the video?

A It's a – it's a general video. It's – it's meant just to give people a little bit of information about what to expect from a first-trimester pregnancy termination, what's going to happen to them in the office, how the procedure will go.

Q Is abortion the only procedure that you use a video like that for?

A No. That's a commercially-produced video, and we may have many videos. We have them for hysterectomies, colposcopies, tubal ligations, laparoscopies. They're available for all kinds of procedures.

Q And do you have a video for second-trimester abortions?

A No, we don't.

Q Why is that?

A I do virtually all of that counseling one on one myself.

* * *

Q Okay. Now, I'd like to have you go on to what's been – the number 53, Bates stamped 53 at the bottom, and what is this form?

A This form specifically talks about the Laminaria. It's a separate form for two reasons. First of all, not all patients get Laminaria, so in some cases it would be inappropriate. And the second case really is to try to emphasize to the patient two real important things. One is that the introduction of the Laminaria introduces a potential pathway of an infection to go from the vagina to the uterus, and so with the introduction of that Laminaria it increases their risk of developing an infection later on. Should the patient choose to change their mind and not have a pregnancy termination, it increases their risk of carrying their pregnancy because of this placement of the Laminaria which is a rather unnatural thing.

The second thing from a functional point of view is a reemphasis that knowledge of how many Laminaria and that they are there is important, because if the person

comes back the next day for a pregnancy termination and overnight they have lost the Laminaria, we're as providers the next day given this question to deal with of did the patient pass all the Laminaria or could have any gone inside the uterus. So we really try to encourage the patients to be aware of the Laminaria, if they think anything has come out of their vagina, to pick it up and bring it into the office so we can examine it.

* * *

Q Okay. And what's the – what are the next sheets after that?

A This is information which is presented to the patient, but also is written information that – for them to take home, which has to do with things that they should watch for after a pregnancy termination is done that may be a sign of a problem, and then gives them the vehicle or avenue to contact us if they have concerns.

Q Okay. Now, after the patient has had a chance to look at this information does she have an opportunity to ask questions?

A Yes. Uh-huh.

Q And who does she – who would she be usually doing that with?

A Usually it, again, would be the – the nurse midwife, although sometimes patients will ask me these questions, like if I'm going to do a pregnancy termination and somebody – somebody asked me to go back over everything again, I've been through this but I want to hear it from you, Dr. Whitefield, and I want to ask you questions about concerns or complications.

Q And if the nurse midwife or nurse practitioner has any questions about informed consent, then what happens?

A They come to us as the providers.

* * *

Q Okay. Now, in a typical two-day procedure when do you see the patient?

A Typically I would see them on the second day.

Q Okay, and that would be before or after the informed consent has been done?

A That would be after.

Q Okay. Now, do you have – what conversations do you have, then, with the patient when you meet with them?

A Usually I walk in and, first of all, try to make the patient more comfortable, because nobody wants to be in that room. None of the patients want to be there. So I'll talk with them to try to make them more comfortable, and then I usually ask them if they understand what's going to happen, what the procedure's about, if they have – if they understand what to expect, and if they have questions about the procedure.

Q Okay. And in your office procedures do you use general anesthesia?

A No.

Q And how long does the procedure itself usually last?

A Usually approximately five to seven minutes.

Q Okay. Now, as part of – and then after the procedure how long does the patient usually stay at the facility?

A It – it depends on whether or not they've had IV sedation and how they're recovering. The short end would be a half-hour. The long end would be two hours.

* * *

Q Now, in your practice the State will pay for a minor girl's abortion – and again we're – I'm speaking now at this time of – when I speak of a minor I'm talking about the classification of 16 and under for our purposes of definitions – and the State will pay for any abortion that is medically necessary; is that correct?

A Correct.

Q And since you've been practicing since 1985 you have been able to find a medical necessity for State-paid abortions for these girls except perhaps for only 10; is that correct?

A I believe that's what I said in my deposition.

Q And your definition of medical necessity is what you refer to if the pregnancy is an affront to the minor; is that correct?

A It's that the pregnancy in some way is a threat to the patient's medical or psychological well-being.

Q And what you use for a definition is a theoretical hazard to her mental health; is that correct?

A I think I've used those terms.

Q And this could mean that if, in fact, the pregnancy would cause her some conc – problems in dealing with education, her continued employment, things of this nature, would be the kind of affront you're talking about; is that correct?

A Independence would be another one, the ability to raise a family. There's multiple factors that will go into it.

Q And you indicate you've been performing abortions in this state since 1985; is that correct?

A Correct.

Q And you testified it's come to your attention during this – these years of practice that some of these girls were impregnated by adult boyfriends; is that correct?

A That's correct.

Q The truth is you have absolutely no records showing that you have ever reported to the State of Alaska or turned in any boyfriend for sexually abusing a minor girl; isn't that true?

A Can you restate the question, please?

Q You have no records or written proof that you have ever filed any report with the State of Alaska turning a girl – adult boyfriend in for having sexual relations with a girl 16 and under; isn't that true?

A That is – that is correct.

Q You have never filled out a police report setting forth statements indicating to you that you discovered that

a girl 16 and under was sexually abused by an adult male; that is true.

A Restate the question, please.

Q You've never filled out a police report reporting this, have you?

A Oh, that's – that's a – that's a different question. You – the first thing you asked me is whether I had the records, right.

Q The record. Now, have you got a police report?

A I – I know that I have interviewed with – with policemen. Now whether – whether I've actually filled a report out, I can't tell you.

Q You don't recall ever writing out a written statement.

A I don't recall writing out a. . . .

Q Something in writing, so we can find out if it's actually been done.

A I don't. . . .

Q Something in writing.

A . . . . recall writing out a statement.

Q So you're not – you don't remember any written statement, do you?

A That's correct.

Q And you've never been subpoenaed to testify before a grand jury about you discovering this statutory rape, have you?

A I have not.

Q You've never testified at trial about reporting any statutory rapes that you've discovered; is that correct?

A I have not.

Q And isn't it true, Doctor, that when a girl 16 and under comes to your clinic you don't ask her the age of the father who impregnated her, do you?

A We do not.

Q In fact, if she's brought to the clinic by an adult male, you don't even bother to ask her what the relationship she has with that adult male, do you?

A No.

Q And this is consistent with your policy, isn't it, Doctor, of your clinic of don't ask, don't tell. Isn't that your policy?

A Our policy is if we become aware of a situation where a minor may have been impregnated by an adult male that that's a reportable event, and we would certainly turn that in.

* * *

Q Now, you've indicated in your prior testimony, Doctor, that you don't consider age a problem in getting informed consent; is that correct?

A I think that getting informed consent is an interaction between the provider and the – and the patient, so I have to sit down, talk to a patient and get a sense for whether what I'm saying to them makes sense, whether they can understand it, whether they can parrot things

back to me, and in the process of doing that make a decision as to whether I think they understand what's going on.

Q All right, back to my original question. Haven't you previously stated you don't consider age as a problem in getting informed consent?

A I personally haven't had that be a problem for me in my contact with patients.

Q In fact, Doctor, you have never denied an abortion to a girl who's come to your clinic without a parent due to an inability to give informed consent; isn't that true?

A I have. . . .

Q I'm talking about a child that's come without a parent.

A Uh-huh. A person who's 16 or – or younger.

Q Or younger.

A Uh-huh. Not the best of my knowledge.

Q In fact, you've never denied an abortion to a girl 16 and under who came to your clinic without a parent due to the fact of her immaturity; isn't that true? I'm talking about just general immaturity, you think this girl's too young to make an abortion decision. You've never denied an abortion to a girl based on that finding that's 16 and under who came to your clinic without a parent.

Q I don't think immaturity is a term that we've talked about here at all.

Q Well, would you recognize the possibility that a girl who came into your clinic, say 11 years old, just might

not be able to be mature enough to make a rational intelligent decision regarding whether or not to have an abortion? Could you possibly recognize that as a possibility?

A It's possible.

Q But you have never experienced that in the entire history of your practice where you found a girl who came in, at least we know as young as 12, anyway, that you thought was too immature to make such a decision without parental assistance; isn't that true?

A In my experience of one or two 12-year-olds, no, that's true.

Q Thirteen-year-old as well, right? Fourteen-year-olds as well. Never have had one. That's what we're saying, right?

* * *

Q Don't you on your previous testimony say I don't go and sit and watch these nurses go over these – explain these medical terms?

A I did, but that doesn't contradict my testimony right now.

Q And you also said I have no idea whether or not they understand the terms or not.

A When I sit down and talk with them, then I get a sense for whether they understand the terms or not. I think you might also re – remember when I gave my statement I said if I talk to somebody about dismemberment, that the reaction that they have in front of me gives you clues as to whether they understand what you're saying or not.

Q Well, the truth of the matter is, Doctor, that you don't talk – sit down and talk with every one of them. You only sit down and talk with one if something comes up or someone asks a question. As a matter of course, if a little girl comes in, she gets the infor – the doc – the nurse practitioner gets her informed consent, gets her medical history, she comes in and she doesn't ask any questions of you at all, and you kind of say you got any questions and the little girl says no, after that that's about all you ask, isn't it?

A No. Not necessarily. I may sit down and say do you understand what's going to happen, this is what I'm going to do, this is the order in which I'm going to do it, this is the sequence of things, this is what you're going to experience.

Q You said "may." That doesn't mean you always do it, does it, Doctor?

A I would say I do it in the majority of cases.

Q All right. And how – and then this is – how many minutes does this all take? When you sit down and go over the final checklist.

A Can't tell you.

Q Uh-huh. Just a few minutes, isn't it, Doctor?

A Probably.

Q And one – and the informed consent form – let's go to the warnings about – guess it's in batch number 0053, the Laminaria. Is that pronouncing that – Laminaria warning.

A Yes, sir.

Q All right. And in most of these cases these girls are going to have Laminaria; is that correct?

A That's correct.

Q And they're going to be responsible to go home on their own with the Laminaria; is that correct?

A That's correct.

Q Those who don't have their parents are going to go home alone with the Laminaria; is that correct?

A That's correct.

Q And what you tell them is they get – find out whether or not they understand it, is based upon this informed consent they have to sign; is that correct?

A Please restate the question.

Q Well, this is the informed consent that the 12- and 15-year-olds are going to have sign just like the adult women; is that right?

A That's correct.

Q And what you tell them there in this informed consent, you must remember that the Laminaria is part of the abortion procedure, and it's very important that you return to the clinic the next day. Once the Laminaria is inserted you are at great risk for infection and complications that could result in sterility, loss of the uterus, ovaries, or death.

A That's correct.

Q Right. What's going to happen if this 12- or 13-year-old girl doesn't come back the next day, Doctor?

A We go to exceedingly great lengths to find them.

Q Right. And if they're living with their parents and for some reason the parents decide it's time to go on a holiday and they can't come in, what are you going to do, Doctor?

A We will utilize all information that's available in our chart to locate the patient.

Q And that girl could die if you can't find her; isn't that true?

A It could happen. It has never.

* * *

Q Well, the bottom line is you don't have to have any specialized training in order to perform abortions, that you just need an M.D. degree; isn't that true?

A I believe that that's true.

Q And, in fact, you don't even have to be a doctor to be running one of these clinics. Any private citizen could start an abortion clinic up and have some doctors hired to perform abortions; isn't that true?

A That's true.

Q So you're sort of the poster child for providing abortions. That's really what we're talking about, aren't you, Doctor?

A I would be flattered to take that compliment, but when I compare myself to the – the other people who practice abortion in this state, I think that we have exceedingly competent abortion providers in this state.

Q All right. But you consider yourself one of the top providers in the kind of care that you provide your patients; isn't that true?

A I consider that we try very hard to do a good service.

Q It's your position, though, isn't it, Doctor, that when these girls we're talking about, these 16 and under girls, they are held responsible for their postoperative care just as if they were an adult; isn't that true?

A Yes.

Q They're treated the same.

A Yes.

Q And you've indicated, also, that minors tend to get later abortions than adults; isn't that true?

A Yes.

Q And you agree that minors who get later abortions have – likely have more – greater risk for abortion complications; isn't that true?

A Yes.

* * *

Q Dr. Whitefield, you were asked about the possibility that a patient following an abortion could die within 24 hours of an infection. Do you recall those questions?

A I do.

Q And what do you think that poss – do you think that's possible?

A If it's possible, it is exceedingly remote. Exceedingly remote. I have never seen it. It's possible – I – I don't know that I've ever read about it. It's not on my radar screen.

Q Do you take any precautions against infection for your patients when they leave the clinic?

A Everybody who has a pregnancy termination with us gets antibiotics in the perioperative period, so just before and just after the procedure.

Q And why do you do that?

A To help prevent infections.

TESTIMONY OF MR. COOKE

Q Okay. You would agree, would you not, that a parent's assistance can often be beneficial to a minor faced with an unwanted pregnancy.

A I – I would hope that a minor's – the parent could be ben – parent's assistance to a minor would be beneficial on hundreds or thousands of things, including this one.

Q Including an unintended pregnancy, correct?

A Isn't that – yeah, I think that's what I just said.

Q Okay. And, sir, is it correct you also believe that it's a bad idea, probably, for a 12-year-old girl to decide to have an abortion with only the advice of a doctor who's going to provide the abortion?

A I – I'm not sure if I accept that statement. I mean, I think it's a bad idea for a 12-year-old to be pregnant or to have a child.

Q Okay. Do you remember making that statement in your deposition, sir?

A I – I could have. I know you asked me such questions along that line.

Q Okay. And – well, would you like to look at. . . .

A I'm not denying it. I mean, yeah, there's lots of things about a 12-year-old being pregnant that, you know, I view as not good – not good circumstances, if that's – I mean, if that's – if I'm to – if the purpose of this discussion is to talk about, you know, that kind of a value judgment.

Q And your time on the bench in Bethel ended in 1986; is that correct?

A That's right.

TESTIMONY OF DR. TSAO-WU

Q Let's talk about medical histories and the information you gather regarding your adolescent patients. In your treatment of adolescents is it sometimes necessary to gather medical histories, personal and family medical histories from your patients, and information about their past medical treatment?

A Yeah, it's – it – yes, it's almost always necessary to gather information from a patient of any age, and, of course, when they're very young you're limited in your ability to do that, and so with – with any of my patients,

again, zero to 18, I rely heavily on – on what the parents' input is. So for obtaining medical history, whether it's how long has this cough been going on to, you know, chronic disease management, I rely heavily on parents' input.

Q We'll talk about that, the parents' involvement in a second, but for now can you give me examples of when and how gathering a medical history, personal or family, on an adolescent patient might be critical to their health care?

A Well, our approach in – in medicine is to understand the data and synthesize a diagnosis and then come up with a treatment plan, so if you don't have that data it's very difficult to – to come up with a treatment plan. So, more specifically, if I'm asking an adolescent about their cough and they don't remember how long it's been or what initiated it or, you know, many other things about it, then I won't be able to really provide them with a good diagnosis or reasonable diagnosis, I'd guess, and then my treatment might also be haphazard in, you know, to some degree because of the limitation on what kind of quality data I can obtain. And then, of course, even if I do guess right, then – then there's compliance issues, and so, you know, if I'm treating somebody then based on scientific research on what works and what doesn't, then my hope is that that patient is going to stick with my treatment plan, and so all those aspects of – from – from initially seeing the patient and understanding their – their disease process to treating them and following up on them are I think better done with a parent involved, and to be able to help with providing data and helping the patient themself understand the disease process, and helping with compliance and follow-up.

Q Thank you. Does the medical history you gather on a patient differ depending upon what particular procedure or treatment you might be providing?

A Not substantially. There can be different emphases, but basically when a physician encounters a patient, whether it's in a clinic or emergency room or admitting them to the hospital or for surgery, there are basic elements to the history that we are trained to go through, and in understanding the current illness and understanding their past medical history and – and that can heavily impact the decision-making process and the treatment, so there's many aspects to the past medical history that we – that we have to go into.

Q Would it make a difference whether the procedure's a surgical procedure?

A Not substantially. I mean, you know, you absolutely must ask a patient what their drug allergies are whether you're going to trim off one of their toenails or, you know, treat their ear infection. So you obtain all this history, and, of course, sometimes you do that at a prior visit, and so you don't have to go through the whole thing every time necessarily, but there – there are aspects of the medical history that seem perhaps unrelated but can shed some light on the disease process, as well as prevent complications. For instance, giving the wrong antibiotic for somebody's toe infection and – or giving an antibiotic that the patient didn't realize they were allergic to can be disastrous.

Q Do you ever have occasion where a patient comes to you from another doctor and you might need to get a medical file, a past medical file from another doctor?

A Yes, often.

Q If that adolescent patient comes to you without a parent, do you have the ability to get that other medical file without parental consent?

A Only certain aspects of the chart under emergency-type situations. Otherwise, people are very – people know to not give their patients' information out even to doctor's offices without the parents' consent.

Q So the typical method of even obtaining a prior medical file from another doctor is parental involvement; is that correct?

A Yeah.

Q Is it in your opinion is it important to involve parents in the process of obtaining these medical histories from adolescent patients, and if so, why?

A Yes, I think it's very important, and that's because of a number of reasons, but in my experience there's a wide range of – of responsibility and understanding of – of a person's past medical history, and so – and even the current illness, and so when I'm – when I'm trying to talk to a – an adolescent I may have a conversation that sounds pretty normal to anyone else, an adult, or I may have a conversation where I only get some yeses and no's and – and I don't knows, and shrugs of shoulder, and that's about as far as a patient can – can get, can muster. So – and, again, you know, I'm in the habit of – of using both sources for information for my medical care. I look at the patient, I ask them how they're doing, whether they're four or 14, ask them what's wrong. I look at the parent, too, and I say, you know, is that – is that the story and what else can you

tell me. So I need to – I need that – I need data from both people.

Q Do you ever rely exclusively upon an adolescent patient to provide you a medical history, family or personal?

A Sure. If they are – if – if there are certain situations where I don't – where the condition doesn't pose itself as a threat to the – the patient's health and there's no way for me to get in contact with the parent, or if I'm restricted by law to not consult the parent, then I might proceed anyway. If I've seen the patient before, for example, for the same problem and they're here for another treatment of the same issue, then there's – you know, from a practical standpoint it's easy to proceed with – with treatment.

Q Doctor, what has been your experience and observation regarding the ability of adolescent patients to communicate with their physician regarding their medical care?

A Well, I think I mentioned that the conversation can be one – can range from fairly coherent and – very coherent and comprehensive to grunts and shrugs of shoulder and, you know – I mean, maybe – maybe it's just me, but I think there's something that happens during the teenage years that sometimes causes people to have trouble communicating.

Q Is your experience with adolescent girls age, say 11 to 16, any different in this regard?

A No.

Q And what has been your experience and observation regarding adolescent thinking and decision making with respect to their medical care?

A That – well, with – with any patient there's this gap between what they understand is the problem – you know, they may just feel pain – and what we're trying to convey as – as the condition or diagnosis or – or the problem, and so, you know, we're always trying to bridge that gap of – of lack of understanding, and that's a challenging thing to do in – in teenagers, I would say.

Q Focusing specifically on adolescents, teenagers, say 11 to 16. . . .

A Uh-huh.

Q . . . . what is the nature of that gap, as you called it, in terms of trying to convey information and obtain information?

A A lack of understanding of pathophysiology, a lack of understanding of anatomy, lack of understanding of even reality when we have to deal with a problem and the patient doesn't want to, then it's pretty easy to deny that there's a problem or not want to face it or ignore it, so that's part of the gap that needs to be – that we're trying to talk to the patient about.

Q In your experience and observation how typical has that been, denial, in the context of your interaction with adolescents [sic] patients and their medical care?

A It depends on the severity of the condition. A person with a sore throat is – is not going to deny that they might have strep throat, but somebody who might have to undergo a surgical procedure might leave the room

upset and never come back, so it's – it – there's a wide range again there, depending on – I don't know if that answers your question or not.

Q Sure. What's been your experience with adolescent patients and their ability to follow your medical instructions for their care?

A That's a constant source of – of struggle for me as well, because, you know, for example, with – asthma care patients do better if they're on preventive medications, and so I often see patients who are noncompliant to a certain degree, so I will assume that they are noncompliant and ask them how much they've been able to take their medication, how many days out of 30, and so it's the rare adolescent who – who, you know, keeps up with their medication and says 30 days out of 30, and it's much more common to say – to find that the patient has either stopped the medication themselves or is taking it 15 to 20 days out of 30. So – and, you know, part of the reason we're here is to keep encouraging patients to – to – to take care of themselves, and, again, all of this is made easier by having a parent. Whether the parent is prodding them or gently reminding them or encouraging them, you know, the parent is – is crucial in my practice to – to the management of these kids' disease process.

Q Do you have an opinion, Doctor, regarding what the quality of medical care would be to an adolescent if the adolescent were the only person that the physician were communicating with regarding the medical care?

A That again depends on the condition, so if – you know, if someone comes in with a wart, you know, I can give them the – the car [sic] that they need and meet their expectations, too, so if we define quality of care as being,

you know, the two – the two parties understanding what the problem is and – and dealing with the problem, then there's a good alignment there and lots of overlap. If we're talking about something more difficult, there may be lack of understanding, there may not be appreciation on either part, mine or the patient's about the risks involved and – with their particular situation, and what their compliance might be, you know, sometimes a patient will say, yes, yes, I will take this medicine and may never get the prescription filled. So if the patient is – is by themself, you know, they're at a disadvantage because they are much less likely, I think, to – to follow through on – on treatment and be able to watch for complications and come for follow-up.

Q Now, in your practice have you had occasion where you have interacted with or treated adolescents without their parents?

A Yes.

Q And what's your opinion regarding the quality of the medical care you provided in those circumstances?

A Again, it depends on the situation and what the – the problem was, but, you know, in anything but the least serious interactions it can always be improved if the parent is there and involved.

Q And you talked about interacting with adolescents regarding high-risk behaviors?

A Uh-huh.

* * *

Q This reluctance to communicate with you or with parents about – oh, let's focus on parents – to communicate with parents about the adolescent's involvement in

sexual activity, has that been true in the patients that you have who have good relations – good relationships with their parents?

A Yes, both those who have a good relationship with their parents and those who – who don't enjoy that type of family. You know, they – there's – there's always tension and conflict when the expectations of the parent, and even the patient him or herself are – are not met.

Q So disappointing a parent's expectations, embarrassment about personal matters, those are some of the major reasons why adolescents are reluctant to communicate about these issues with their parents. . . .

A Right.

Q . . . . in your observation? Doctor, in your practice do you obtain informed consent regarding your treatment of adolescent patients?

A When there's a procedure to be done we go through the process of obtaining informed consent, yes.

Q And what is your understanding of what it means for a patient to give informed consent to a medical procedure or to treatment?

A Well, with our patients, because they're underage they – the informed consent comes from the parent, so it's kind of a complex scenario, but just as I've been talking about, in all aspects of medical care with a teenager you are talking both to the teenager and parent about the procedure that needs to be done and the risks involved and the possible complications what I expect them to do in follow-up, and then with – you know, with certain procedures we are basically obtaining verbal consent or – you

know, from both parties, the parent and the teen. And – but when it comes to legal – legally protecting ourselves and to prove that we obtained informed consent, we'll have the parent sign a consent form.

Q Do you feel parental involvement is important in the informed consent process for adolescents?

A I do – I do view it as being very important.

Q Why?

A Again, because the – I think the understanding that a parent can have regarding the importance – or the – the magnitude of the – the problem and the procedure, the problems that could ensue, their understanding lends understanding to the – the patient themself.

Q Do you have an opinion regarding the ability of an average adolescent to give informed consent to a medical procedure?

A Again, it depends on what you would consider informed, I suppose, because a person can consent to something and not truly understand, but – you know, I – I think you can go through the motions of obtaining informed consent with anyone, and there's always gradations of how informed they are and how much they're able to understand. So with adolescents are they better informed with their parents' input and discussion or – yes, I – I believe that is the case. So is the informed consent of – of – sort of less quality when they're alone? I would say that that is the case.

Q Now, you told us in your practice you've had patients, adolescent girls age 11 to 16 who have tested positively for pregnancy?

A Yes.

Q And in your report in this case you describe adolescent pregnancy as being a crisis in a young girl's life. Can you explain what you mean by that?

A Well, in most cases a – an unwed teenager is not expecting that they'll get pregnant. They may be do something to prevent that or they may be doing at all [sic] to prevent that, but for most it's a shock to under – to – to – to find out, and then they must come to grips with something that has a lot of ramifications for both their physical being, as well as every other aspect of them. So it's – it's a crisis in the sense that their usual social situation and their – even their bodily function is suddenly altered, and they then have to face these – these decisions and issues related to medical care and – and interacting with their – their family.

* * *

Q Dr. Tsao-Wu, Ms. Novak asked you about your patients and how they comply with your instructions, and you mentioned that – I think I heard you say that their compliance improves with age. Can you explain why that is?

A Well, I think after a person gets to be – I was speaking gen – in general age up to their early 20s or mid 20s, then they begin to become more responsible for their own health, but I personally don't often find a whole lot of difference between 17/18-year-olds and 15/16-year-olds.

Q Do you believe that it's necessary to have a law mandating parental involvement for a young girl to receive prenatal care, childbirth, medical care? Is it necessary. . . .

A No.

Q . . . . to have a law that requires, mandates, parental involvement?

A No, I think that we can encourage prenatal care, I don't think anybody objects to prenatal care as being something controversial or negative.

TESTIMONY OF DR. JOSEPHSON

Q And can you explain to the Court what Dr. Todd's study was that she did in trying to compare the – these differences occurring in the adolescent brain with actual adolescent behavior?

A Well, what she did actually was controlled – or compared a set of adults, 15 adults, and a set of 15 adolescents, did MRI studies, functional MRI studies, in other words, looked at them while several stimuli were presented to the study's subjects, and these stimuli consisted of pictures of individuals showing various emotions, and – and then they were asked the – the study participants to common [sic] what the emotions were, and they looked at which areas of the brain were functioning during that – that time.

Q And did she find that there were difference [sic] in the way the adolescents process and perceive information?

A Yes. She was – found that the area of their brain, the amygdala, which is part of the limbic system, which is the emotional circuitry, if you will, of the brain was different than – in adolescence when compared to adults.

Q And in her article did she make a conclusion as to the comments on the results of her study?

A She concluded, actually, also commented on the frontal area of the brain, but the frontal area was less active and the amygdala was more active in adolescence.

Q All right. And on the second page of the study can you inform the Court what her final conclusion was?

A She. . . .

Q You may read it if you want.

A She – her quote – she stated this examination, this test makes one wonder how well an adolescent can plan appropriate responses when they're often unable to correctly interpret their environment.

Q All right.

A She based that on the teenagers misreading facial cues more consistently than adults did.

* * *

DR. GIEDD: The putting down phase is perhaps even more interesting, because the hypothesis for that is the use-it-or-lose-it principle. Those cells and connections that are used will survive and flourish. Those cells and connections that are not used will wither and die, so if the teen is doing music or sports or academics, those are the cells and connections that will be hard wired. If they're lying on the couch or playing video games or – or MTV, those are the cells and connections that are going to survive.

NARRATOR: It is not only what a teenager does that matters, but how old he is and what the immature

brain is capable of doing. Some areas coordinate and oversee others, and it is those parts of the brain that have long interested neuroscientists.

DR. NELSON: We've known for a long time that what we actually call the prefrontal cortex, the part that sits behind your forehead, is involved in planning behavior, your use of strategies, a technical term we call cognitive flexibility, which is can you change your mind and do you have sort of a fluid way of going about solving problems.

DR. GIEDD: Part of the brain that is the so-called CEO or the executive of the brain is still being built during the teenage years. Teens are capable of enormous intellectual and – and artistic accomplishments, but that basic part of the brain that gives us strategies and organizing and perhaps warns us of potential consequences isn't fully on board yet.

* * *

DR. GIEDD: The cerebellum in the back of the brain is the part of the brain that changes most during the teen years. So this part of the brain has not finished growing well into the early 20s, even. The cerebellum used to be thought to be involved in the coordination of our muscles, but we now know it's also involved in coordination of our thinking processes, just like one can be physically clumsy, one can be kind of mentally clumsy, and this ability to smooth out all the different intellectual processes, to navigate the complicated social life of the teen and to get through these things smoothly and gracefully instead of lurching through adolescence seems to be a function of the cerebellum. As a society we're less active than we ever have been in the history of humanity. We're

good with our thumbs and our – and video games and such, but as far as actual physical activity, running, jumping, playing, children are doing less and less of that. Recess and play seem to be the first thing that is cut out of school curriculums in – in – in tight times, but those actually may be as important or maybe even more important than some of the academic subjects that the children are doing.

(End of videotape)

THE COURT: Let's turn the lights back on.

MR. DAVIS: May I proceed, Your Honor?

THE COURT: Yes.

DIRECT EXAMINATION CONTINUED

BY MR. DAVIS:

Q Dr. Thompson, regarding the information set forth by the scientists in this videotape, that information do you agree with?

A Yes.

Q And regarding this impairment process that the scientists discuss going on in the adolescent brain, in your opinion does this impairment affect a minor's abortion decision making?

A I – I would – excuse me – re – restate the word impairment. Impairment we use in medicine is – is – is a deficit. This is something that's – it hasn't fully developed. It's just not – not there yet. It – it's a deficit when compared to adult functioning, but clearly that lack of development of that, or impairment as you say, would be very

much related to any important life decision, and certainly one regarding abortion.

Q Doctor, in your expert report we go to – in section B you use the phrase psychosocial development and adolescent pregnancy, and you go on to comment that girls who are 16 and under who are sexually active and become pregnant you define as developmental failures.

A Yes.

Q Could you explain to the Court what you mean by that?

A In simplest terms, when a girl 15, 16, 13 – excuse me – becomes pregnant, it's a clear indication of a problem. This is not a random event and it's not something that we would see is occurring in the process of normal development in – as health, as part of normal healthy development, and so something is missing. The – the things that typically occur when children develop, developing a sense of trust, reliance on others, a feeling of self-confidence, self-efficacy, control of impulses, and developing age appropriate and friendship. These – these typical building blocks are often missing or askew in a child who becomes pregnant, so when there is a child who becomes pregnant it's a clear indication of a problem in almost all instances.

Q This developmental failure, do you believe is something that parents need to address, to correct?

A Absolutely. In fact, I would even go further. Not only need to address, the parents are inextricably involved with the developmental failure. It's not just on the shoulders of the child. If a child is missing something it's a responsibility for a parent to say how did this happen, how

have they missed this thing that most adolescents don't miss, what part do I play. So clearly parents are involved with any developmental failure in its cause, and probably its resolution.

Q In your opinion do adolescents volunteer for appropriate behavior?

A When you say volunteer for appropriate behavior, I'm assuming you mean things that occur in the process of devel – normal development or – adolescents, like – like many of us, but certainly don't volunteer for things that they're supposed to do, if – if that's what you're referring to.

Q Right.

A Uh-huh. Many times they'll resist something that's obviously healthy for them, but they decide not to, whether coming in on time or going to bed on time or brushing their teeth, even, for example, for a younger child.

Q And is that part of parental responsibilities, to sometimes enforce things which minors do not wish to do in order to help them development [sic]?

A Absolutely. I – I would even go further with that of not only the responsibility, but a test of effective parenting is how they deal with the resistances of their children and their difficult moments. It's easy to be a parent when things are going well, but when there are resistances in a child, to work through them is usually an indication of effective parenting.

Q Does a secret abortion hide from the parent this developmental failure?

A A secret abortion hides and delays the inevitable, because parents eventually find out, and it delays the – the inevitable need to deal with the facts, how this came about, and try to deal with this problem, and to keep parents outside of that problem-solving sequence makes no sense at all from a clinical standpoint.

* * *

Q So is it your opinion that a secret abortion is counterproductive for this process?

A It would pre – it'd prevent dealing with the issue, yes.

Q In your report, section D, you go to the topic of adolescent myths as barriers to growth. . . .

A Yeah.

Q . . . . and this section, Doctor, you refer to about – comment about stress is associated with – stress associated with parental involvement is beneficial. Could you explain to the Court what you mean by this?

A Well, as a general rule many of the things that occur in development that are most helpful are somewhat stressful, and the tendency to avoid them is there and real, but to work through that, deal with the stress and master a difficult event, is a crucial aspect of adolescent development. I've used the example of an examination, but to use that again, most young people might enjoy the fact that an algebra test is cancelled because it's overwhelming to them, but they know they need to master it to pass their – their math course. There's a tendency to – to want to avoid things that are stressful, that are good for you, and that difficult moments in a family, avoiding dealing with a

conflict, and, obviously, presenting an adolescent pregnancy is a serious conflict, adolescents would rather avoid that, but the stress of working that through is not necessarily unhealthy at all. In fact, I would suggest it's very healthy to meet it head on.

Q You comment, Doctor, something about the desire of adolescents to both be controlled and have freedom. Can you explain what you mean by that process?

A It's a fundamental part of adolescent development of – to use the phrase – wanting it both ways. Kids want to be treated like they're adults and have their own desires, but at the same time will just turn around and ask for guidance, either directly through their verbal requests or through their behavior, and it's an awkward time of I want to be taken care of and I want to be left alone, and kids typically have several years of this behavior, most – most typically during the years of 12, 13 and 14.

Q Regarding your comments in your expert report in the area of assessing risk factors for negative postabortion adjustment, you indicate that age is a risk factor. Can you explain that to Your Honor – your – Doctor?

A Well, the younger a child the less equipped they are cognitively to understand the consequences of their behavior, the technical aspects of a proposed abortion, the technical aspects of adoption, for that matter. There is just less cognitive maturity and development. In addition, their emotions, as we've already discussed, are more labile or potentially more out of control. Their anxiety, which we all face when we're asked to deal with a situation that's very difficult, is much more so for a child, and parents are there to help modulate that – that anxiety. So – so the physical

understanding of it, the emotional handling of it, the younger a child, the more they're at risk.

* * *

Q All right. Doctor, the – again, we're going to the information which abortion providers think they need to get in order – information in order to have a safe abortion. Can you just – first, let's just go through what they list as what information they need, and then we'll discuss about this information.

A Okay. This abortion provider stated that the screening procedure should address these issues. The length of gestation in terms of fetal age. Is the pregnancy complicated by uterine abnormalities, multiple gestation, hydatidiform mole or other conditions. Is the pregnancy complicated by history or the presence of medical-surgical conditions such as diabetes, neurological disorders, previous cesarean section, cardiovascular disease. Is there a history of psychopathology. Can the patient comprehend sufficiently information provided, and is her decision informed and a voluntary one, and can the patient sufficiently understand and cope with her own feelings.

Q Now, in your opinion, Doctor, based upon your studies and your clinical observations of girls in the age range from 10 to 16, are they going to be competent to respond to these inquiries in a satisfactory and comprehensive manner on their own?

A No.

Q Can you explain why?

A Well, first of all, some of the conditions medically that children have, they are not fully aware of their

origins, their treatments, their management. Parents often need to provide the technical details. Second, a number of conditions that they have that are in the area of psychopathology or feelings are often accompanied by denial or distortion that we routinely rely on in any clinical encounter of having parents give their perspective on this, so there's a factual reason that – that you need other information, there's an emotional reason, and then there's a third area that is quite important, in that an unintended pregnancy is very emotional indeed, for some catastrophic event, and under the influence of anxiety a developmentally overwhelming experience leads to difficulty processing information and expressing one's self. So a frightened, anxious young child with incomplete facts, who may be withholding things, could not really give full answer to such screening procedures.

* * *

Q And you indicate – you attached to your expert report some 14 risk factors that are listed that should be evaluated prior to any abortion; is that correct?

A Yes.

Q And you list that as table 1, Exhibit C?

A Yes.

Q Could you tell us what those 14 risk factors are?

A Risk factors in – in the – table 1, low self-efficacy, expecting depression, severe grief or guilt and regret after the abortion, low self-esteem prior to the abortion, an existing mental illness or disorder prior to the abortion, significant ambivalence about the decision, lack of emotional support and receiving criticism from significant

people in their lives, perceived coercion to have the abortion, intense guilt and shame before the abortion, belief that a fetus is the same as a four-year-old human and that abortion is murder, fetal abnormality or other medical indications for the abortion, using – sorry – usual coping style is repressing thoughts or denial, unresolved past losses and perception of abortion as loss, experiencing social stigma and antiabortion demonstrators on the day of the abortion, past childhood sexual abuse, commitment to the pregnancy.

Q Doctor, do you believe that an abortion counselor could accurately assess many of these risk factors without parental involvement?

A No.

Q Can you explain why?

A Well, as I mentioned, a number of things related to medical care apply here to essentially psychiatric or emotional care. Some of the facts regarding instances of depression or past history a parent would need to provide, the child would not have, as well because of denial and coping strategies that are not atypical with adolescents, parents would have to provide a countering opinion to say that, in fact, she did have an overdose, for example, if the patient denied having an overdose. So that this is basic child and adolescent mental health, frankly, that – that one cannot get a review of the predisposing emotional factors that are comprehensive or effective just from a child.

* * *

Q Dr. Josephson, are you aware that Dr. Stotland has claimed that these studies have problems because you

can't determine whether or not the complications are caused by the unplanned pregnancy or the abortion itself. You – are you aware of her comments on that?

A Yes.

Q And are there studies that refute that assertion?

A The – again, the – the relative risk model is – is an important response to that, in that there are – clearly, an unintended pregnancy is a stress, but the event of abortion is associated with a higher incidence of self-harm, for example. I've quoted a study by Gilchrist, which is in the family practice literature in Britain, who looked at over 10,000 women who – either those who had had an abortion and those who had not, and the incidence of self-harm was much higher in that group, and so the – the – the act of an abortion is associated with increased problems, not just the idea of an unintended pregnancy. The – those that decided to abort have – have other problems, and there's more recent research that shows – by Coleman and colleagues – that women who decide to have an abort [sic] seem to have more trouble with their parenting of their young children and providing supportive environments for young children and controlling the behavior of their young children, and so – so clearly the unintended pregnancy is a stressor, but the act of abortion does seem to be associated with some problems in addition to just an unplanned pregnancy.

Q Next in your report you address mental health risks associated with adolescent abortion in section I, and you make a comment, Doctor, that sim – the simplicity of abortion is seductive to young girls of this age. Can you explain what you mean by that?

A Well, as we've discussed, adolescents tend to be impulsive and shortsighted and do not look into the future, and when one – one – one is faced with an overwhelming stress it is seductive to just be rid of it, to have it gone, to have the stress be over, and that certainly I think is present, and – and heightened with – with children.

Q Do you believe that secret abortions prevent monitoring of mental health risks that the minors may have after abortion?

A Absolutely, because the – through the secrecy it closes children not only from parents and the resources that they might provide, but public agencies who also might be able to get involved with children who are in difficult circumstances. Children who do have abortions eventually go back to homes, families find out about these things, and the secrecy then places a second burden on the children because information has been withheld, there's poor family communication, parents are angry that they have been kept out of the loop, to use that phrase, and so that secrecy never works. Delay is inevitable, which is dealing with this developmental failure and conflict, and so it's – it's never good policy.

Q Regarding mental health risks with these children, is the younger the child – is there a relationship between the youth of the child and their degree of vulnerability?

A Yes.

Q And explain why.

A Children are less able to cognitively come – cognitively understand situations. Children are less able to manage their emotions. They're less able to think clearly

when faced with a stress, and they simply don't have the facts at – at their disposal to make appropriate decisions. The – the support of parents means a lot to them.

Q And the younger they are, the more support they need? Is that what you're saying?

A Absolutely. The thing we mentioned earlier in – in my testimony, I'd like to refer to the – the abandonment of children to their own decision making is terrifying to them, and the younger they are, the more that's true. Now, adolescents tend to protest and they want it both ways, as we discussed. They want to decide on their own, but when push comes to shove, so to speak, to be left with major life decisions without input from a parent is experienced by an adolescent as an abandonment. It is not experienced as being helpful. Even if the situation is difficult, kids want their parents to know.

Q Regarding – you make a comment, Doctor, that acute stress can compromise preabortion decision making. Can you explain what you mean by this?

A Maybe the best way I can explain that is to use an example, and the example I would use would – would go like this. As a physician I have not practiced surgery for a long time, and in my training I only practiced minor surgery, but if I was asked today to take out a gall bladder and appendix, I would joke and say I've not been trained for that, I'm not prepared for that, but if I was pushed for that and somebody said you have a license, you're a doctor, aren't you, do it, my anxiety would go sky high, and it would go high because I'm not prepared or would not be prepared for the task at hand, and I would know it, and I would fear failure and fear in this case of harming someone else, and that's exactly the emotional experience of an

adolescent who has to face an adult-like task, raising or dealing with a human life that's growing within her, and have to do that without any of the preparation that an adult would have. So a child essentially is terrified of that, whether they can actually put it into words, and to have them being alone is not the way to help a decision – a decision of this import, and so the anxiety is high, they shouldn't be alone, and should get assistance with that.

Q And from your research, Doctor, have you found that even adult women have difficulty in negotiating the abortion decision processes?

A Well, I – I haven't – haven't done research on – on that myself. I think that the – the issue that – in terms of understanding and – and comprehending some of this I think can be a lot even for adult women, but certainly it's much more so than – much more so for an adolescent to understand what's going on.

Q And do you believe that parental involvement and – would help deal with the problems a minor would have in this abortion decision caused by the acute stress?

A Yes.

* * *

Q Regarding – Doctor, in your expert report you make comments regarding in certain situations where parental involvement – exceptions to parental involvement; is that correct?

A Yes.

Q And regarding these areas where there – in other words, there are certain areas where it – that the child has

a legitimate interest in not having the parents involved; is that correct?

A Yes.

Q All right. And one of these areas, would that be in a situation of incest?

A Yes.

Q Doctor, do you believe, though, that in a situation of incest is it best – the best interests of the minor to cover up the problem, the incest, abortion – incest with a secret abortion, or is it better that it be reported to the authorities so that problem can be dealt with?

A Unequivocally it's better to have it reported to the authorities.

Q So you believe it's not in the best mental health of the child for her to remain in that type of environment.

A That's right, and to have secrecy continue to persist and allow dangerous behavior, unhealthy behavior to continue, because it would only worsen and predispose the child to greater risk.

Q And in a situation where a girl says that she was afraid of family violence if she reported her – reported the fact that she was pregnant and was going to seek an abortion, is it best to place that child back into the home and cover it up by secret abortion, or should that be revealed to the proper authorities?

A It should be revealed to the proper authorities.

Q And in situations where you – the child is in a violent home and subject to violence, the fact that you

have a secret abortion, is that even going to heighten the potential of violence against her?

A Violent homes share certain kinds of characteristics, and these include volatility of temper, typically of the father, substance abuse, denial of problems, misinterpretation of the meaning of behaviors, and to come into that kind of home with the news that I've had a pregnancy and abortion and nobody knew about it would only heighten the potential for violence, so as I said earlier, secrecy, no matter how seductive it seems to be or how short term solution it seems to be, for a child is never an answer because it'll come back with a vengeance in – in violent families.

Q Regarding this issue of secrecy between child and the parent, does this undermine the parental relationship where there are secrets withheld from parents regarding their children?

A Absolutely. Now, I would add that adolescence is a time of moving from children – childhood status to adult status, and that that naturally involves an increased sense of privacy, a sense of independence and so forth, but with decisions that have major import, that are dangerous, life altering, legal involvements and these kinds of things, for a child to make them alone is – is not in their best interest at all.

* * *

Q The fact that the parents are not aware of the abortion and cannot monitor the child's mental health pertaining to suicide risk, depression, all these complications you've indicated, does that place the child's – not

only her mental health in danger, but her physical health in danger?

A Potentially, yes, it could.

Q Dr. Josephson, you've had an opportunity to read the State of Alaska's parental consent statute; is that correct?

A Yes.

Q Do you believe that the State of Alaska's parental consent statute would be in the best interest of a minor child?

A Yes.

TESTIMONY OF DR. UHLENBERG

Q Doctor, from your research and study have you come to an opinion on what happens if these laws are in effect and it causes abortion rates to go down, and what are the consequences of that, if any?

A Well, I – I think the most common position would be that abortion rates do decline after enactment of – of parental involvement laws, and so the question has been whether this would force up the birthrate, that if – that is, whether the abortion rate declines because fewer adolescent girls are getting pregnant or because they are carrying the pregnancies to term rather than abort them.

Q Doctor, have you had an opportunity to look at the – what we call the bypass provisions in our statute?

A Yes, I read that.

Q If I were to represent to you that we had a judge from Minnesota, and just telling you that Minnesota has a parental involvement statute in effect, and the judge has testified in this case that just recently the number of judicial bypass hearings that he has heard has dropped from 50 a year to about 18 a year, would that tell you anything about the possible effects on the abortion rate in that state?

A Yeah. I mean, that isn't very much information, but the first assumption would probably be that the number of abortions is going down, so the number of – of girls seeking a bypass is going down.

Q Doctor, are you familiar with the study of Dr. Ellertson on the states of Minnesota, Indiana and Missouri that is our Exhibit 119?

A Yes, I've reviewed that.

Q Doctor, could you take a look at – I think you have your own copy of our Exhibit 119, and just tell us the title of that study just for the record?

A This is "Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana."

Q And, Doctor, if you take a look at table 5, which I believe is at page 7 of our version. . . .

A Yes.

Q And looking at that, did that – what conclusion did you draw from the data that's set out in table 5 regarding the birthrates in those states that were studied?

A This suggests that the – in Minnesota the birthrate for adolescents less than 18 increased slightly – this is comparing the period immediately prior to the law with the period immediately after the law – but that increase was similar to the increase that was occurring for women who were slightly older and not affected by the law. In the case of both Missouri and Indiana – well, in the case of Missouri the birthrate for the affected adolescents increased significantly less than it did for the girls 18 to 19, and in Indiana the decrease in the birthrate was significantly larger for the under 18 than for the 18-to-19-year-olds.

Q What conclusions could you draw from this data, Dr. Uhlenberg?

A Well, that, plus the indication that the in-state pregnancy rate declined much more rapidly for the – for the under 18 than for the 18 to 19, is suggestive that one effect of this legislation was to reduce the number of pregnancies for the adolescents affected by the law.

Q And is there any indication from this study, Dr. Uhlenberg, from Dr. Ellertson's study that the birthrates went up?

A No, I think that's one of her conclusions, because this was a popular hypothesis at the time she did the study, that it would push the number of unwanted births up, and – and she did not find any evidence to support that in these three states.

Q Doctor, besides the potential benefit that you mentioned, that these laws may reduce pregnancy rates, is there another potential benefit that you considered in

forming your opinion, a potential benefit from a parental involvement law?

A Yes, I think that an important benefit that might come from this law is helping to protect the adolescent girls about – against undue influence from the boyfriends who impregnated them.

Q Okay. Before we get to that issue, though, Doctor, which we are going to get to, have you formed any opinion on whether the laws actually bring down pregnancy rates?

A I – I think there is growing evidence that they have the effect of reducing pregnancy rates.

Q And that's in addition to not having an increase in birthrate.

A Yes.

Q Doctor, could you take a look at No. 2259, which – our number, which is your – you should recognize it as your expert report, but we'll see if you do?

A Yes.

Q And in No. 2259 did you set out some research that you had done in the area of pregnancy rates as related to parental involvement laws in other states in the country?

A Yes. In a rather simple way I looked at – compared Mississippi before and after the enactment of a parental consent law there with the neighboring states that all – each of those states already had a parental involvement law in effect.

Q Okay. Can I stop you just for a moment, Doctor? Just so – for the record, we're looking at page 18 of your expert report, which is headed table 1. Is that. . . .

A Yes.

Q . . . . what you're looking at?

A That's correct.

Q Okay. And what did you compare, sir?

A This is a comparison of girls affected by the law, that is, 15-to-17-year-olds, with the girls slightly over 18 to 19 who were not affected by the parental consent law.

Q And what conclusions did you reach after – well, first of all, sir, where did you get your data for this?

A This is coming from a publication from the Center for Disease Control called the mortality and morbidity weekly report.

Q Okay. And what conclusion did you draw from doing this – making out this table, looking at that data?

A In this case the – there are two kinds of comparisons, the pregnancy rate for 15-to-17-year-olds between 1992, and 1994, which the law went into effect in 1993. So I'm taking the year before and the year after the law went into effect, and the pregnancy rate for the girls affected in Mississippi declined substantially more than for any of the neighboring states. In fact, in two of the neighboring states the pregnancy rates increased in this time interval. The second comparison is the 15-to-17-year-olds with 18-to-19-year-olds in the same state, and, again, the pregnancy rate for the affected girls declined more than the pregnancy rate for the older girls.

Q Dr. Uhlenberg, did you also look at a study conducted by Dr. Rogers of the effects of the Minnesota parental involvement law?

A Yes, I've reviewed that.

Q Okay. Sir, if you'd take a look at what we're calling Exhibit 120, and do you have that in front of you?

A I do.

Q And what is that, sir?

A "The Impact of Minnesota Parental Notification Law on Abortion and Birth."

Q And it's by Dr. Rogers, and then several others; is. . . .

A That's correct.

Q . . . . that correct? Sir, what – if we look at page – let's see, 296, I think it's – we have it numbered as page 3, and what did Dr. Rogers conclude regarding the birthrates of the group affected by this parental involvement statute, the 15-to-17-year-old group?

A He concluded that the decline in the birthrate for 15-to-17-year-olds and 18-to-19-year-olds was much greater than for the rest of the adult population in the state.

Q And did he make a comparison between the decline between the affected group of 15 to 17 and the older group in Minnesota?

A Yes, that it was a – a significantly greater decline in the birthrate for the 15-to-17-year-olds.

Q What did Dr. Rogers conclude was the possibility – a possible explanation for that?

A I think that his conclusion is that the enactment of this law led to a – first of all, to a decrease in abortions, but then also the – at least no positive effect on the birthrate; that is, the birthrate for the affected girls continued to decline, and perhaps more than it would have otherwise, suggesting that the pregnancy rate was declining.

Q Okay. Dr. Uhlenberg, if you'd look at page 296 there under discussion, and the middle of that first paragraph, and in there does Dr. Rogers suggest a possible reason why the birthrates fell and the abortion rates fell?

A Well, his – his conclusion tends to be the birthrates fell in keeping with the long-term trend, that is, the birthrates were already declining before this law was enacted, but the abortion rates fell markedly for the age group affected, and he sets out several possible explanations, which he then. . . .

Q Okay, what. . . .

A . . . . says run. . . .

Q . . . . is – what were his possible explanation?

A He said that one possibility is that minor women who were affected by the law were going out of state to obtain their abortions, and so were not reported in Minnesota, or others – concerns would be with growing concern over the hu – human immunodeficiency virus infection.

Q And did he suggest a possibility that you agree with a little more than those?

A Yes. He says that because of the very rapid decline in number of abortions it doesn't seem likely that other explanations could account for it, except possibly going out of state, but then he cites a reference that suggests that it's very unlikely that many girls from Minnesota would have gone out of state for abortions because of the distance to abortion providers out of state.

Q Dr. Uhlenberg, if you'll look at page 296 in the paragraph labeled discussion, in the middle of that paragraph, the sentence beginning with "one possibility," and could you read that to us, please?

A One possibility is that when minor women are restricted from abortion without notifying parents or seeking court approval, and are geographically prohibited from easy access to out of state abortions, they're more likely to take measures to avoid pregnancy.

Q Dr. Uhlenberg, do you di – agree or disagree with that conclusion as a possibility – being a likely possibility?

A I agree that that's a likely outcome.

Q Dr. Uhlenberg, can you see or do you see that there might be an effect of pregnancy abor – of waiting because of parental involvement law if a minor is faced with perhaps a second pregnancy?

A Yes, I think if the parent is aware of an earlier pregnancy, there is a likelihood that they will intervene more significantly with the – the child and attempt to help her avoid an additional pregnancy.

Q Dr. Uhlenberg, could you take a look at exhibit – what we're calling Exhibit 121?

MS. NOVAK: Your Honor?

THE COURT: Yes.

MS. NOVAK: We have an older version in the binders, and I have a newer version of this study that matches Mr. Doogan's copy. If I could approach I could bring it to the witness and to Your Honor.

THE COURT: I already have in my binders the substitute version.

MS. NOVAK: Oh, you do.

THE COURT: That's right, but if you'd like to show it to the witness. . . .

MS. NOVAK: Okay.

A Thank you.

Q Do you recognize the document itself, though, what we're calling No. 121, in either version there?

A Yes, I – I think I've reviewed both versions, so. . . .

Q Okay, and what is that, sir?

A The – a long title. "The Impact of Mandatory Waiting Periods and Parental Consent Laws on the Timing of Abortion and State of Occurrence Among Adolescents in Mississippi and South Carolina."

Q Okay. And if you could turn to table 1, and I think it's on page 270 in our new version here.

A Yes.

Q And, Dr. Uhlenberg, did you look at this table and give it some consideration before today?

A Yes, I have.

Q And what do the data in the table on table 1, what do they show?

A For Mississippi it – it shows that the number of abortions occurring to residents of Mississippi who were eight – 18 and younger declined 14.3 percent in the 10 months after the enforcement of the parental consent law, compared to the ti – 10 months preceding that.

Q Now, was there a difference that the authors noted between some of the requirements of the South Carolina and the requirements of this Mississippi law?

A Yes, they state that the Mississippi law is probably the most stringent law in existence, and that it requires the consent of two parents.

Q And is there also a delay law built into Mississippi's?

A That occurred not exactly at the same time, but within a year or so of the parental consent law there was a – an informed consent and mandatory waiting period law that went into effect.

Q And what was the effect from table 1 that was shown on South Carolina minors?

A For South Carolina the – the decline in number of abortions to resident minors was even greater, a 19.3-percent decline in the 10 months after compared to the 10 – 10 months preceding.

Q And what are possible explanations for the decrease in the number of abortions for minors in Mississippi from this study?

A Well, the – it again could – you could see a decrease in the number of abortions if an increasing proportion of these girls were carrying the pregnancies to term, that is, having live births instead of abortion after the law was enacted, or you could see a decline in the number of abortions if – if fewer pregnancies were occurring.

Q Was there any evidence from the study that the birthrates increased?

A There was no significant increase in the birthrate after these occurred, after the law was enacted.

Q Dr. Uhlenberg, did you consider the possibility or not consider the possibility of minors in Mississippi traveling to other states as a result of the law to obtain abortions?

A Yes, that's at least partially reported in the – table 1 in the Dr. Joyce paper.

Q Okay. And how likely or unlikely is that to account for all of the drop in the abortion rate?

A Well, the decline in the – the large decline in number of abortions were in-state abortions. The number of girls going out of state for abortion increased by 23 in the period after compared to the period before.

Q So there could be a 23 – is that a number or percent?

A That's a – a number, 23 – increase of – of 23 girls going out of state for abortion in the 10 months after the law was enacted, compared to the preceding 10 months.

Q Doctor, could we take a look again at 2259, which is your expert report, and what we call table 2 at the end

of that? And that would be on page – I'm looking at page 19 of your expert report.

A Yes, I have that.

Q And what is that, sir?

A I found three states that during the 1990s enacted parental consent laws similar to Alaska, not identical to Alaska's, but requiring consent of one parent. They differ in that they also affected 17-year-old girls instead of only the – the younger ones. So I compared the pregnancy rate before and after the laws were enacted in these three states, compared the pregnancy rate for 15-to-17-year-olds with the change in pregnancy rate for 18-to-19-year-olds in the states.

Q And what conclusions can we draw from this table 2, dir?

A Well, in each of these three states the pregnancy rates for 15-to-17-year-olds declined substantially in the year after compared to the year before, and the declines were much larger than they were for women age 18 to 19; that is, the closest age group not affected by the law.

Q Okay. In Kentucky what – how much greater, approximately, was the decrease in pregnancy rates for the affected group?

A Would be about six percent larger decline for the 15-to-17-year-olds.

Q Okay, and how about Pennsylvania?

A Pennsylvania would have been about a 10-percent greater decline for the 15-to-17-year-olds.

Q Okay, and then how about Michigan?

A Michigan would have been approximately 11 percent greater for the 15-to-17-year-olds.

Q And, Dr. Uhlenberg, can you draw a conclusion from looking at this table 2, or did you draw a conclusion as to whether those laws had any effect?

A Yes, the conclusions are always tentative, but, you know, this is – they support the argument that pregnancy rates decline after enactment of a parental consent law.

* * *

Q Dr. Uhlenberg, if a minor who is faced with an unexpected pregnancy is required to tell her parents about it because of one of these laws, will – in your opinion might that have an effect on her future sexual activity and fertility activity?

A Yes, I think by having the parents involved in the decision of what happens after the first pregnancy, at least some parents are going to more actively monitor their child's behavior and perhaps restrict her dating behavior and this sort of thing.

Q On the other hand, if a parent doesn't know about the first pregnancy, what, if anything, could that parent do to affect their child's avoidance of another one?

A There would be – if the parent is unaware, then they are not going to be able to change their monitoring, probably, of the adolescent, or they'd be no reason for them to change their monitoring behavior.

Q Dr. Uhlenberg, did you see any effect of this law on the actual involvement of parents in the lives of their minor daughters?

A I think that in some cases it probably would lead to an improvement in the relationship in the sense that the support of the parents as the girl goes through a difficult decision would be viewed as strengthening the relationship with the parent.

Q Doctor, do – can you – do you this law or not as requiring, as mandating, as forcing parents to be involved in their daughters' lives?

A Well, because of the possibility of judicial bypass, some girls could avoid involving their parents, but for – as I understand the law, it would require the consent of one parent before the girl could have an abortion.

Q Would that. . . .

A With – with – without. . . .

Q I'm sorry.

A . . . . the judicial bypass, of course.

Q Okay. However, do you believe or not that this is a guarantee that parents will sit down with the girl and talk over the things that led to her being pregnant and wanting an abortion and so on?

A No, we can't achieve that by law. We think it can influence or facilitate that, but it doesn't necessarily lead to that outcome.

Q Doctor, what effect in your opinion do families or parents have on the various health risks that face minors? For a moment just exclude abortion, exclude pregnancy.

A Well, the research is quite – quite strong on this in – in suggesting that probably the most important factor affecting adolescent well-being is the family context that – that they live in, and within family context it's that relationship with parents, involvement of parents in the lives of the children that tends to protect children from harm.

Q And does that include protecting them from health risks that they might otherwise face?

A Yes.

Q Dr. Uhlenberg, if you took a look at No. 2137, please. . . .

A Yes, I have that.

Q And I think you have that before you. Could you tell us what that is, please?

A This is entitled "Protecting Adolescents from Harm: Findings from the National Longitudinal Study of – on Adolescent Health."

Q Okay. What is the national longitudinal study of adolescent health or on adolescent health?

A This is the most ambitious study of adolescent health and sexual behavior ever undertaken. It involved surveying approximately 90,000 adolescents, middle school and – and high school students, and then the longitudinal part of it is that they have followed up with a subsample of this initial sample.

Q And, Dr. Uhlenberg, did the study look at various behaviors by minors that could lead to health risk?

A Yes, it looked at a number of – of factors affecting health.

Q Okay. Dr. Uhlenberg, if you look at page 830, please, of that study, of 2137, on the right-hand column there there's a heading that says history of pregnancy. Do you see where I am?

A Yes.

Q And in this part of the study did the authors reach any conclusion about protective factors against a pregnancy by minors 15 and older?

A Yes, they say that – if – if I could read one sentence here: A greater number of shared activities with parents, and perceived parental disapproval of adolescents' contraceptive use were protective factors against a history of pregnancy.

Q What does protective factors mean; what did that phrase mean?

A They're trying to assess the factors that would lead some adolescents to not engage in sexual activity compared to others.

Q Okay. Doctor, you mentioned before another benefit of the – that you saw in the law regarding the partners of minors. Would you state that again, please? What benefit did you see from the law regarding minors' boyfriends, if any?

A Well, there was substantial concern about the coercive influence of older boyfriends on their younger

girlfriends, and this comes up both with regard to violence in the relationship, as well as decisions of a girl regarding – well, affecting the likelihood that a girl would become pregnant, and, if so, the outcome of that pregnancy.

Q What factors might influence a – an adult boyfriend of a minor female in influencing the – first of all, the – well, the – influencing the outcome of a pregnancy?

A Well, I think the incentive or – of adult males for not having the pregnancy result in a live birth are the increased child enforcement activities – child enforcement – the child support requirements of men who are fathers of children who are born.

Q Dr. Uhlenberg, is it always true in your studies in this field that the boyfriends or – adult or not – of minor females who become pregnant, is it always true that they involve themselves in the outcome of the pregnancy; that is, deciding what happened?

A No, I'm sure they don't in all cases.

Q Okay. Doctor, if there was – well, let me withdraw that and ask it this way. Are you aware of data that concerns the type of adult input that a minor faced with a unexpected pregnancy gets on pregnancy resolution?

A Well, I've reviewed the study by Dr. Henshaw that talks about that.

Q Okay. If you take a look, then, at No. 123. . . .

A Okay.

Q . . . . and is this the study you just mentioned?

A Yes.

Q Could you tell us for the record what the title is, please?

A "Parental Involvement in Minors' Abortions Decisions."

Q And turning to table 8 in that, which is at page 205, at least the printed page number. . . .

A Yes.

Q . . . . you're familiar with that data?

A Yes.

Q And, Dr. Henshaw, what does that data indicate for girls 15 and younger in this study where her parents – neither parent knew of the pregnancy, who was involved most often in the decision regarding the pregnancy?

A Okay. There was a slight slip. I'm not Dr. Henshaw, but. . . .

Q I'm sorry.

A . . . . I'll – I'll respond for myself.

Q Yes, I'm sorry. Yes, Dr. Uhlenberg.

A When neither parent knew of the abortion and the girl was under age 16, the – the most common person involved was the boyfriend. That was in 93 percent of the – the cases.

* * *

Q Okay. Had you read the original study by Dr. Males and Dr. Chew that – regarding this subject?

A Yes, I've read that.

Q And do you agree, then, having read that other study, with the conclusion that Dr. Males states in this commentary?

A Yes.

Q Could we turn to that one, 2098? Should be our exhibit number. And what is that, Dr. Uhlenberg?

A "The Ages of Fathers in California Adolescent Births, 1993."

Q And was that a large – you – you've read this study before; is that correct?

A Correct.

Q And this is a document that was referenced in the commentary that we just looked at?

A That's correct.

Q Or the study. Was that a large study or a small one?

A This was a very ambitious study looking at 46,000 California births to school age mothers in 1993.

Q Dr. Uhlenberg, if you could look, please, then at table 1, which looks to be on page 566 of that document?

A Yes.

Q And what does that table show regarding minors who gave birth, first of all, nationally – well, first of all, does it break down the data between the United States generally and the state of California?

A Yes, I see that.

Q Okay. Does it – could you tell us what this table shows regarding the age of the fathers – or the percentage of fathers of children born to minors 10-to-14-years-old in the United States during 1992 to how many were in the 20-to-24-year age range?

A Yes, in the United States 24 percent of the fathers were girls age 10 to 14. . . .

Q And then. . . .

A . . . . or age 20. . . .

Q . . . . how about in California?

A In California it was 27 percent.

Q And then looking at the age group, 15 to 17, which is – includes the group would be affected in Alaska, but actually includes a little more than that, what was the percentage of fathers 20-to-24-years-old for girls in that age group who gave birth nationally?

A It was 40 percent.

Q And then how about California?

A Identical, 40 percent.

Q And, Doctor, is that a matter of concern from a sociological standpoint; that is, from the sociology of the family? Is that a matter of concern, or should it be?

A Well, we need to separate concern about social problems from sociology. Sociology would tend to be a scientific investigation which doesn't come to a conclusion about whether something is good or bad, but the sociological data are then used, and, of course, researchers

themselves have positions with regard to whether these are desirable or undesirable kinds of findings.

Q Doctor, if you could look at the – on that page 566 where it says results?

A Yes.

Q And apparently is it correct that the authors of the study used a couple of different approaches to determining the figures that they came out with?

A Yes, I think. . . .

Q What were those?

A Well, because some fathers' age was not stated on the birth certificates, they used what they call upper and lower boundary to estimate how many of the fathers would have themselves been over age 20 or have been adults.

Q And did it reach a conclusion on – did they reach a conclusion in that paragraph on the numbers of fathers – or, actually, the percentage of births to fathers who were pre – pardon me – postschool adult men where the mother was 17 years old?

A Yes, this says that the low estimate would be that 66 percent of the infants born to 17-year-old mothers were fathered by men age 19 and older, and it may have been as high as 76 percent. They can't tell within that range, but it's. . . .

Q And then how about for 15-year-old mothers at the bottom?

A For 15-year-old mothers 47 percent of the infants would have been father – fathered by postschool adult

males under the lower estimate, and 63 under the upper level.

Q Dr. Uhlenberg, could you please turn to No. 147 next, and that's our Exhibit 147.

A Yes.

Q And what is that please?

A It's entitled "Age Differences Between Sexual Partners in the United States."

Q And who is the principal author there?

A Darroch, D-a-r-r-o-c-h.

Q And have you read this study before and considered it?

A Yes, I've reviewed this.

Q Okay. If we turn to table 1 in this study, No. 147, table 1, which is, let's see, page – I think I have a page here – looks like 163.

A Yes, I have table 1.

Q Okay. What does the data in that table show regarding the age differences between women – well, first of all, let me withdraw that, and for purposes of clarity, is this a study where they actually act ab – ask about not necessarily pregnancies and births, but about sexual activity itself?

A Yes, these tables come from several different sources to – to make estimates, and one source is a survey giving information on what they call romantic relationships by age.

Q Okay. And table 1, is that the one that deals with the sexual partners of the women and girls that are shown there?

A Yes, this is having had sex in the previous three months by difference in age of partners.

Q Dr. Uhlenberg, in the 15-to-17 age group for the females what did the study show – or the – what does table 1, the data show the percentage of those who had sexual partners who were at least three and up to five years older?

A Shows that about 35 percent of the male partners were three or more years older than the 15-to-17-year-old girls.

Q Okay. And does that include about 30 percent in the three- to-five-year age range?

A Yeah, that's 29 percent.

Q And then close to seven per – or 6.7 percent had partners who were six or more years older; is. . . .

A Yes.

Q . . . . that correct?

A That's right.

Q And so then we have a total of what percent had partners at least three years older?

A Rounded off, that would be 30 – 35 percent – 36 percent, I'm sorry.

Q Dr. Uhlenberg, if you'd turn to page 164, and in the text there under table 2 did the authors conclude

whether there were differences or not – and, I'm sorry, do you have the same copy I do? It's the printing under table 2, and it's in the paragraph. . . .

MS. NOVAK: I think you meant page 164. You might have said 174.

Q I'm sorry, 164. It's part of the findings. Okay.

A I'm not sure. The page numbers are. . . .

Q All right.

A . . . . cut off on my copy.

Q Let me just give you my copy, then. You have different page numbers on yours.

A Well, they're cut off for some reason. Okay.

Q Did the authors of that study, then, make any conclusions about differences in the pregnancy rates for those minors who had older partners?

A Yes. For the girls who had older partners the pregnancy rates were higher than for the younger girls.

Q Okay, specifically for the age group younger than 18 what did they report as the pregnancy rate by age of father – or age of sexual partner?

A Okay, the – the pregnancy rate for under 18-year-old girls whose partner was younger than two years older than themselves was 176.6, and then it goes up for girls where the partner was six or more years older to 653.8.

Q Okay, Doctor, in the text there. . . .

THE COURT: I'm sorry, Doctor, I. . . .

Q .... did they break that down?

THE COURT: .... I lost you.

MR. DOOGAN: Okay.

A Okay.

THE COURT: I'm not sure exactly where you are reading from?

MR. DOOGAN: May I approach?

THE COURT: Yes, you may.

A I'm on table. . . .

THE COURT: If you look at the text at the bottom of page 164, and actually it's the highlighted portion.

THE COURT: No, the doctor was referring to some numbers and. . . .

Q You're referring to. . . .

A I was. . . .

Q .... what?

A .... reading from the table.

THE COURT: Okay, table 2. Where in table 2 did you read those numbers so I can track?

A This would be pregnancy rate on the. . . .

THE COURT: Uh-huh. Okay.

A .... left-hand column, the less than 18-year-olds, and then you have total, you have for younger to two – where the partner is younger than two years older. . . .

THE COURT: Okay.

A .... up to six or more.

Q And from the text, though, at the bottom of that – under that table on 164, what did the authors conclude?

A Yes. Based on those numbers the conclusion is that for adolescents younger than 18, the pregnancy rate among those whose male partner was six or more years older was 3.7 times the rate among those whose partner was no more than two years older.

Q And then how about for those whose partners were three to five years older?

A Yes, that's intermediate. The rate for those whose partner was 3.5 years older was 1.4 times as high as for the ones where the partner was less than two years older.

* * *

Q Yeah. Dr. Uhlenberg, just – look at figure 3, which is the chart.

A Yes.

Q And just below that is there some indication of a percentage for which the age of the father was not known from birth certificate records?

A Yes, it says it was not known for 24 percent of the births, the females age 13 to 19.

Q Okay. Doctor, turning back to page 4, in the text next to table 1, is there a conclusion for the mean ages of the – mean age of the father for whom age was listed on a birth certificate for the age group less than 18 years – for the mothers who were less than 18 years of age?

A Yes, reading from that paragraph it says: For births to women less than 18 years of age, the mean age of the father was 24.5 years, and 84 percent of the fathers were over 20 years of age.

* * *

Q Is minors', in your opinion from – you go to the minor and you go to the family – is minors' reluctance or fear to tell their parents about an unplanned pregnancy and perhaps a desire for abortion a good reason not to have a law such as the parental consent act?

A No, I think that generally we agree that parents have a right to know what is going on in the lives of their adolescents, especially in terms of behavior that has significant implications for the adolescent.

Q If there is forced knowledge – we'll call it forced knowledge – an initial response of parents, though, is anger and disapproval and disappointment, do those responses, in your opinion, disqualify those parents from further involvement in the minor's decision about her pregnancy?

A No, I think we find that those emotional responses are common in families for different circumstances and they are not considered a indicator of dysfunction in a family.

Q Okay. Would those kinds of responses, initial responses, make those parents a threat to their daughter's well-being?

A No, those respon – emotional responses by themself would not be threatening.

———

TESTIMONY OF DR. CALHOUN

Q Doctor, Dr. Richey brought to the Court's attention a variety of what she represented to be life-threatening conditions that a minor might eng – might become involved with in prenatal care. What I would like to ask you is just how frequent these conditions are, and explain to the Court regarding preeclampsia. How frequent – how likely is a girl who's 16 and under to actually be faced with a decision regarding this?

A The – the statistics are – are different depending on population groups, but somewhere between 7 and 15 percent of patients may develop preeclampsia. However, the – the risk of developing severe preeclampsia, meaning severe enough that it caused you to be devel – deliver before 37 weeks is probably less than one or two percent, and those are not life-threatening forms of preeclampsia and actually respond well to delivery, and would actually be part of the normal prenatal care that anyone would receive, including those who are not adolescents.

Q Regarding this trisominy [sic] – tri – correct my mispronunciations.

A Tri – trisomy.

Q Trisomy 18, how fre – how frequent is this likely to occur?

A Trisomy 18 is actually quite rare, and also extremely rare in those who are adolescents. The care for someone in that particular situation is the same as the prenatal care for anyone else. A trisomy 18 is not a diagnosis that places the mother's life in danger.

Q And the insmimenger [sic] syndrome is. . . .

A Eisenmenger syndrome.

Q Eisenmenger syndrome, yes.

A I don't know how to spell that, so I'll have to use the – what you have previously. Eisenmenger syndrome is actually very rare. It is a complication of specific complex cardiac defects that are not very common anymore because we correct most of the problems that used to lead to this. If, indeed, that were the case, again, medical therapy is indicated and you would treat this patient as you would treat anybody else who had a significant medical problem and was pregnant.

Q How about severe diabetes that would cau – in this age group that would cause pregnancy complications?

A In the under 16 severe diabetes is not that common, for the most part because the patients have not lived long enough to have enough time to develop most of the serious complications related to insulin-dependent diabetes. However, if there were complications, again, you would treat the patient, give them the appropriate therapy, and would treat them much as you would treat another woman, with the idea that they are adolescent

and would require some special care in the clinic and oversight with their parents.

* * *

Q Doctor, in your 20 years of experience in dealing with these hundreds and hundreds of girls who are in high-risk pregnancy situations, how many girls have you lost as a result of a – the – a fetal condition that actually died during delivery?

A None of them have.

Q In your opinion, Doctor, after 20 weeks is abortion safer or is delivery safer?

A Well, if you read the – if you read the textbooks, including Dr. Grimes' text, delivery after 20 weeks is actually safer than doing D & E's or deli – or abortions after 20 weeks, and there's no benefit to the pregnancy anyway.

* * *

Q Doctor, in your opinion is one of the risk factors in an abortion the skill of the particular provider doing the abortion?

A Yes. In fact, every surgical procedure the risk of complication is directly related to the skill of the operator and the training of the operator.

Q And do you believe that parents would be valuable assistance to children picking out competent doctors to perform abortions?

A I think that they're – most 16-year-olds or 15-year-olds are totally unaware of the fact that most states do not require abortionists to be obstetrician/gynecologists or

have any training whatsoever in gynecology, and that parents would be able to give them that information and direct them to people that were competent providers. I don't think most 14- or 15- or 16-year-olds would be medically sophisticated enough to be able to do that, and would – would really need their parents' input and involvement to provide that care.

Q Do you think parents are needed for these girls in order for these girls to understand what is going to happen to them and to give an informed consent?

A Yes, I do. I think the parents have to be involved and hear it.

Q Doctor, do you think parents are needed to help their children monitor their condition during the abortion procedures?

A I'm not sure I understand the question.

Q Well, let me give you an example. In a situation where a child is being – going through a two-day abortion procedure and the abortion doctor has inserted the Laminaria and requires the child to come back the following day, do you think it's important to have parents aware of that so they can ensure that the child returns for that treatment?

A It is imperative that they understand that, for if the patient happened to be doing it in secret and the parents and the – the adolescent left to go someplace on a vacation or left to go somewhere, there are risks for infection, toxic shock, bleeding, and/or other complications if it's not – if the abortion's not done appropriately and supervised by the parents appropriately.

Q In your experience in dealing with these minor children over 20 years how – just how reliable on their own are they in following medical care instructions?

A Adolescents are notoriously unreliable, frankly. They are very difficult to get to do things, they are very difficult to get to appointments sometimes, and we rely very heavily on their mothers and fathers and family members to really help get them to appointments, to help get them scheduled for ancillary consultants, to help them get them to our appointments for ultrasounds, to make sure that they're taking their prenatal vitamins. All the things that go on with prenatal care, we rely on the family. Adolescents most of the time just are not really very good about that.

Q And regarding the parent – necessity for parents getting involved in monitoring their children's care for postoperative complications from abortion, do you think that it's necessary to have parents involved in that for the safety and health and welfare and benefit of these children?

A I think the parents have to know any surgical or operative procedure that's been done on their child, particularly an abortion, which does have complications of bleeding and infection, including toxic shock and/or severe complications related to the abortion, just like I would a cesarean section. I'd want them to know those so they could monitor the patient and take good care of them and bring them back for follow-up.

Q And if a child delays in getting treatment for abortion complications, can this have severe consequences?

A Yes, there's been many – many case reports of delay of di – diagnosis and young women bleeding to death and/or becoming seriously infected, and my own experience of having to have hysterectomies and complete loss of their reproductive capabilities. I've had them be in toxic shock because of secret abortions and because of the lack of follow-up by their family. So, yes, I think it's imperative that they have their family members or people involved to help them get the postoperative care they need.

* * *

Q All right. Now, what's the youngest pregnant patient that you've ever had?

A Ten years of age.

Q Did she deliver?

A Yes, ma'am.

Q And how many 10-year-olds have you seen?

A How many have I seen personally?

Q Yes.

A For sure one, and several 11-year-olds. I couldn't tell you how many 11-year-olds.

* * *

Q Let me ask the question – break it down a little bit. I used the term elective abortion in my question.

A Uh-huh.

Q How would you define an elective abortion?

A I think the elective abortions are those that are done not – for not medical indications, and basically in my mind to save the life of the mother is an elective abortion.

Q Okay. And I don't think, though, you ever got to the – my final part of my question, which was do you think that parents who actively support their daughter's decision to have an elective abortion are acting in her best interests?

A When I look at the literature I don't think they are, but they probably think they are.

Q Now, it's your opinion, isn't it, Doctor, that the vast majority of abortions for minors 12 to 16 are not medically necessary, correct?

A Yes, that is true.

Q Okay. And can you define again what you mean by medically necessary?

A Well, I think I did, but I'll repeat it. Those that are done to save the life or protect the life of the mother are the medically indicated abortions that I'm talking about.

* * *

Q Do you agree with Dr. Isada's position that he believes that the procedure Dr. Richey's doing by doing D & E procedures without using ultrasound is an unsafe procedure?

A Yes, and it has been for probably 15 years. We all use ultrasound even for the basic dilatation and extractions or D & C's.

Q So her own partner believes that she's engaging in substandard practice, at least in that area; is that correct?

A Yes, sir, if that's what he – if that's what he said, yes, sir.

TESTIMONY OF DR. ANDERSON

Q What has been your observation regarding adolescent girls 16 and under in terms of their responding to and dealing with abortion complications?

A Adolescent girls, most of the time denial is the biggest issue and fear. If they've been engaged in high-risk behavior, which we define sexual activity, drug addiction and suicidal issues as, that's something that they're not wanting everybody to know about, and so if you had a girl who's become pregnant and the become – had an abortion, they are hoping this whole process will end as soon as possible, and the abortion doctor will tell them you're going to have pain and you're going to have bleeding as a normal complica – not a complication – as a normal part of the process, so when they have some bleeding or some pain they're equating that with this is going okay, this – and that denial issue means I don't want to think that I'm out of the realm of normality. This is going to be over soon, I'm going to finish it. And then if things don't get better and they come in, it's really after a longer period of time because of that denial, and now the fear is this whole process is not ending, it's continuing, going on. So those are predominant issues, as well as a sense of wanting to hide, being ashamed of the – the process of the abortion – not everyone, but a percentage.

* * *

Q Okay. Let's just focus on parents for a second. Sounds like your experience is some of the parents who

show up at the ER with their daughter for an abortion-related complication knew beforehand that she had an abortion, and that's why she's coming, for a complication related to that or they think it's because of that, and some of them learn for the first time that she had an abortion at the ER; is that correct?

A Yes.

Q Can you tell us your observation in terms of parent-daughter interaction that you've observed in both of those contexts?

A Well, the – if – there – there's kind of three different circumstances. If the parent knew about the abortion prior to the abortion, they are brought there sooner, and the focus is on now the appropriate treatment, what do we do, just go help my daughter, how serious is she and what – what's our next step. Now, if the child's been at home and they're not getting better or the pain's getting worse, they might inform their parents at home after a 10-hour or a 12-hour period from that time of first having symptoms to the time that the child is really getting scared, listen, I had an abortion, and that parent will arrive with new information about their daughter, but it's not early, but still the focus is what now can we do, they've had some [sic] to process that information. And the third group of patients that I've had to deal with is parents who I've had to tell them your daughter is sick because she's had an abortion and we need to have an obstetrician see her about further treatment, whether it's a D & C to help stop the bleeding, and so now they're not only focused on how sick their daughter is, they've got to deal with the issue that she was pregnant and the implication that has with it as far as sexual activity and the disappointments there, they

have to deal with the fact that their daughter's had an abortion, that she was really hiding from them, and just the sense of disappointment and trust issue there. So you're dealing with really conflicting emotions. My daughter's sick, but I've added all these other issues in with the primary focus of my daughter being sick, and so they're trying to process a lot of information in order to make a good decision, because I need their permission to involve a doctor to do the D & C if it's bleeding, or admit them to the hospital and start IV medical antibiotics.

Q Now, staying with that last group of parents, all the things that you've just described for us that that parent is dealing with, having learned for the first time their daughter had an ER [sic] because you told them, what are the reactions you've seen from the parents in that context?

A Well, certainly, embarrassment if this stranger, i.e., myself, is telling them something about their daughter that they don't know, that's – many times that I as a parent when people have had to tell me some report about one of my children, you're just embarrassed. You're dealing with the shock of the behavior that's involved and the disappointment there, and – and that's – they have to process that, and sometimes they have to work through the disappointment and anger, but they always generally reconnect. They'll come back, okay, now I've processed this, I've been through this, but let's focus on what I need to do now. So give them some space and talking with them, they'll come to focus on the appropriate next step. We've got to do something that's going to be in the benefit of your daughter's health care. So they will reconnect.

Q Okay. Staying on that last group of parents, how many times in the course of your experience as an ER physician dealing with these sorts of situations have you in your observation of the parent-child interaction had a concern that that girl might go home and be abused by her parents?

A I've not.

* * *

Q Have you had occasion to see young girls 16 and under who have come to your ER, but have delayed coming to the ER for care related to an abortion complication?

A Yes.

Q How prevalent is that?

A That – like I said, the complications of abortion run in between anywhere from 10 to 20 a year, and because of this high-risk behavior of that patient population, parents aren't involved. I mean, kids don't go out and tell their parents I'm going to be sexually active or I'm going to go out and get drunk tonight, and so even from the inception of that activity parents aren't involved, so I would say 10 to 20 a year, which three to five a year being an extreme condition, and the others we're able to treat and I don't involve them in – I don't involve the parents. I still can't involve the parents on the kids that aren't super sick unless they give me their permission so I can treat them, tell them to watch out – what to watch out for and discharge them.

Q Can you distinguish in your mind – focusing on the issue of delay that you've discussed, can you distinguish in your mind – maybe I should phrase it in terms of

the timeliness in which a young girl might seek care at the ER for an abortion complication. Can you distinguish in your mind between those who have parents who knew about the abortion and those who learn for the first time at the ER?

A Yes.

Q Please do.

A The complica – the parents who know about the abortion are much quicker to bring the patient to medical care. That – we just see that parents act much quicker than kids do and are more decisive on all the areas of decision-making process because they have, I mean, experience, as well as they're abstract thinkers versus concrete thinkers. I mean, it's a whole host of issues. But the parents who are involved are much quicker to get interventional care.

* * *

Q What are the possible consequences of delayed medical treatment for an abortion complication?

A Well, delayed treatment can make death if infection spreads out of the fallopian tubes into the bloodstream of – a higher possibility or potential. It can make sterility if the ut – infection has spread up the uterine cavity, out the fallopian tubes, but not into the bloodstream, you see the chronic – the scarring of the tubes causing sterility. If bleeding is excessive, then you're dealing with underperfusion of organs, whether it be brain or heart or kidneys, and that can have implications or possible death, and if there's perforation of the colon after perforation of the uterus, that delays – delay of treatment – I mean, the thing that it happened is catastrophic. Delay of

treatment is catastrophic as far as seeding for a sep – I mean, in infection and/or bleeding.

And the last one is depression or psychiatric. Kids – I think all of us who've raised adolescent children recognize that they begin to develop their own world, their own identity, and they pull out of the adult relationships somewhat, and they don't communicate as much, so we're not as quick to pick up on depression because we're not really seeing how sad they might be. So I've – probably my largest population of postabortion complications is suicide ideation and depression and/or suicide attempts, and that's not short term, nor long term. It's over a whole time period, because that guilt sometimes just seems to persist and persist, and the girls just can keep stuffing it and stuffing it, and so we don't see that as a short-term complication. If the parents don't know to – to recognize it they might say, well, my daughter's just withdrawing like such and such daughter, they just don't communicate with me much, where in actuality they're really dealing with a depressed teenager.

Q We'll talk about the emotional issues in a second, but for now can you tell me how long a young girl has to delay treatment for an abortion complication before some serious sorts of issues can ensue?

A I would say four to eight hours.

Q Four to eight or 48?

A Four to eight. . . .

Q Four to eight.

A . . . . hours. If she's bleeding heavy, we don't even want them bleeding heavy four hours. I mean, you can

bleed down – thankfully, that – that's not the case, but if you're dealing with infection, we see infection spread – I watched an appendicitis patient come into the emergency room and they'll go in a matter of three to four hours from a mild appendicitis to a significant appendicitis and need surgical intervention, so an infection can spread quickly, and bleeding if it's heavy can be compromising very quickly.

Q Okay, now, what about uterine perforation?

A That would be a matter of hours, because if you perforate the uterus the intra-abdominal cavity is sterile, and so you've given access for bacteria from the vaginal vault, and if there's a perforation of the colon, from the colon into the intra-abdominal, and we can see them go from seeding to bloodstream infection four to eight hours.

Q Now, the source – you're talking about bleeding. The source of this bleeding, heavy bleeding that might be a complication, I want to make sure I've. . . .

A Okay.

Q . . . . covered what would cause that, and that would be – one is the uterus doesn't constrict?

A Uterus doesn't constrict and you have this whole – it's like hamburger meat on the inside – a whole muscle of raw, irritated – it's been surgically scraped, and so it's oozing, and if the uterus doesn't contract and cause the pressure to cause these veins on the inside of the uterus to clot off, they will ooze blood, or if the uterus is perforated and you have a vein on the outside of the uterus, on the wall of the uterus, and that can bleed internally to intra-abdominal. So that's why you can have both bleeding that

goes internal intra-abdominal or external, from the inside of the uterus that goes down the vaginal vault externally.

Q And what about an incomplete abortion?

A Incomplete abortion is you have retained placental parts. They keep the uterus from contracting, and so that bleeding is generally going to be external as the infection – once the uterus doesn't contract, you're going to have a higher likelihood of bacteria migrating up the vaginal vault into the uterus itself.

Q All right. I didn't ask you this earlier, but can you kind of give me the order of magnitude in terms of all the abortion complications you've described, of which ones you see that are more prevalent, less prevalent?

A The most common one would be your psychiatric, your depression, the guilt issue, and kids who handle that with inappropriate – I mean, if they're by themselves the suicidal ideation, suicidal attempt, that's your most common. Your next common as far as – would be infection, this intrauterine that has not gone bloodstream, that's from an external focus rather than a ruptured uterus, and then bleeding, which is external, and the bleeding sometimes just requires uterine massage or repeat D & C, but the bleeding is probably the least common of those three. Now, perforation of the uterus as a cause of those is less common than any of the others, and then sterility is an issue that we see later, but that's your 10-year later when a woman wants to get pregnant. That's not something you pick up short term.

* * *

Q Dr. Anderson, when we broke we were talking about abortion complications and you were describing to

us what they were, and then particularly we were talking about how delay in seeking care for a complication might impact a young girl's health, and you told us about bleeding, and I don't want to go back to that. Let's talk about infection. How long – how much of a delay does it take for an infection to spread before something becomes serious?

A It is proportionate to the amount of bacteria introduced to a closed space, so you can't say that any infection is going to start off at the same level of severity, but once you have initis of infection where you have a locus of bacteria that have replicated enough to establish an area of infection, I would say in that environment four to 12 hours it's going to make significant difference, just the migration up the uterus into the fallopian tubes then makes the woman much more susceptible to tubal scarring and long-term infertility, and then the next step is at the fallopian tubes into the intra-abdominal cavity and seeding the bloodstream and intra-abdominal cavity. So four to 12 hours can be very significant time delay once initis of infection is established.

Q All right, let's talk about the – maybe we didn't talk about uterine infection. Let's talk about – uterine perforation, excuse me. Tell us about that in terms of the timeliness and the delay and what the impact is.

A Well, the uterine perf – perforation is much – if – if you hit the colon and that whole organ hadn't been sterilized in preparation for the abortion, it just has a huge bacteria count that's introduced into the abdominal cavity, so colon perforation – uterine perforation with colon perforation is very significant as far as a quick infection spread. I mean, four, six, eight hours. The – if the uterus is perforated and there's no colon violation, then it's slower

because the bacteria will probably come up from the vaginal vault into the uterus, and then – we're just not talking about as a short of time period as the colon perforation would involve.

Q What is the time frame we're talking about?

A Probably eight – eight to 10, 12 hours.

Q Okay. Just focusing on uterine perforation, you seem to be describing, like, the negative consequences of that being infection and/or bleeding. Is there something independent of those that – that it's a problem with a uterine perforation, or is that pretty much it?

A That's pretty much it. I mean, if – if you have uterine perforation sometimes the only way you can stop it is to do a hysterotomy, and then you're going to have infertility along with infection and bleeding because she's lost her ability to – to get pregnant. If – if the colon's perforated, then you're going to have a colostomy, and what that would entail, and, thankfully, they're not that common as far as uterine/colon perforations, but it – it opens up that whole arena of complications if you have a colostomy.

Q Okay. Let's focus on the individual abortion complications, and I want you to talk to me about what the symptoms are for recognizing that that might [sic] a problem. If we have an infection, what are the symptoms that a young girl or a parent might be looking to recognize to figure out that there's an infection relative to an abortion?

A Pain, bleeding and fever, and generally you'll have – and what's difficult to recognize that is that after an abortion a young lady is definitely told you will have some pain and you will have some bleeding.

Q And how do you know that?

A Well, because all of our ladies that we do uterine biopsies looking for uterine cancer, anything like that, whenever you violate the cervix and do a procedure on it and then you have uterine contraction, you will have pain, and so that's the common instructions that I've seen on postabortion instruction lists, as well as what we tell our ladies. Now, we don't do abortions, but we might do a biopsy of the uterine lining, and we tell them you will have some pain and some bleeding. Now, for a young lady, a young girl who's wanting this process to end and denial is playing a significant part, hoping that this is just all normal process of finishing it, she's not going to look at escalating pain as necessarily an abnormality. That's what the doctor told me, and, therefore, it's not going to be a red flag to her, as is bleeding. He told me I was going to have some bleeding or she told me I was going to have some bleeding. And so the symptoms aren't some obscure things. It's common. It's just the degree of the symptoms that alerts us that we're not heading in the right digr – direction.

Q And the symptoms that you've described, are those the same symptoms you would see regarding infection, bleeding, uterine perforation; pain, bleeding and fever, are those the same symptoms you see for all those. . . .

A Well. . . .

Q . . . . or are there more?

A Well, the fever is kind of the last thing that happens with infection. I mean, you have pain, you have bleeding, you have fever, and then an escalation of pain,

escalated bleeding and escalation of fever, but as – as the infection gets established and – you'll have the fever, and if the young lady – young girl isn't taking her temperature, she just might notice it as chills and feeling hot. Now, if it's purely bleeding they won't have fever. I mean, if – if you just have the uterus not clamping down, you could have not much pain, but significant bleeding only, no fever with that, but with infection you generally have fever, bleeding and pain.

Q Now, is the bleeding always externally visible?

A No. If – if there's uterine perforation and the venous structure of the uterus is – there's some large veins on the outside of the uterus, and if one of those veins is lacerated, you'll have leakage of blood into the intra-abdominal cavity and she won't know that.

Q All right. What has been your experience as to the ability of young girls 16 and under to recognize these symptoms and put it together that they need to come to a physician for help?

A It's very compromised, because they're dealing with denial, they're dealing with symptoms that they've been told will occur, and that combination means they'll sit tight. I don't want anybody to know what's going on, I just want to get it over, and the doctor said these are going to happen, and so their ability to act appropriately is very much compromised or delayed.

Q In those cases of abortion complications that you treated where the young girl had not informed her parents previously of the abortion, how prevalent has been the delay that you've seen?

A It's generally that six to 12 hours, the delay. It's significant.

Q But in how many of the cases?

A Oh, I would say of that subpopulation of 10 to 20 girls that I see a year it's 80 to 90 percent of them, because their parents weren't involved. I mean, this high-risk behavior does not involve their parents.

Q And when. . . .

A So. . . .

Q . . . . there has been parental involvement, how has that been different?

A They've come earlier. They come at the beginning, and they're not near as sick. We do have some parents who will know that their children are sexually active and want them on contraceptives, and the pregnancy will happen, so they're involved in that whole process at an earlier stage.

Q All right. Do you have an opinion, Doctor, regarding the value of parental involvement in a young girl's postabortion care?

A I think it's critical.

Q Why?

A Because we institute timely care and cut down complications and the severity of the complications with the timely care.

Q Have you in your experience seen young girls who have presented for an abortion complication at your ER with her parents, and her parents were in your observation, in your opinion, loving and caring parents, and yet,

nonetheless, the girl had not told her parents of a pregnancy or abortion beforehand?

A Yes. I mean, as a particular – some – say a pastor and his spouse, and the daughter knows they're loved, they know that the home is a very relationship-oriented home. . . .

Q Is this an actual experience you're relating. . . .

A Uh-huh.

Q . . . . to us?

A Yes.

Q Go ahead and tell us about it.

A And the daughter knows she's loved, but she also knows this could be very much of an embarrassment to her father or mother in their role as a pastor, and say out of deference to them she will want to have this hidden, and it's not because she is afraid that they're going to abuse her. And then there's another situation where I've seen where a single parent might have two or three kids and their single mother's have just done a tremendous job in picking up the ball, where a lot of dads hadn't stayed around, and that teenager who's helped could end up pregnant, and they say, man, this is going to be a stressor on Mom, Mom might not be able to afford it, we might not have insurance, Mom doesn't have the time for this, and they just really – they're in a very functional loving relationship with their mom or dad, if he's a single parent, but they don't want to add another stressor [sic] the home environment, so they will go out and try to hide it [sic] that situation, so. . . .

Q Have you had young girls actually relate these things to you?

A Yes. Yes.

Q And – I interrupted you, I'm sorry.

A So I would say young ladies – young girls from relationship-oriented families trying to avoid the embarrassment of the family or trying to avoid disappointing parents that they love or trying not to add another stressor to the situation are all very much players in that decision tree of the young girl.

Q Have you had an opportunity to learn the age of the males who typically have impregnated adolescent girls 16 and under who present for either pregnancy or abortion complications in your ER?

A That hadn't been something that I'd say I have a grasp on from my experience.

Q Well, let – let's not go there, then. Okay. Have you had an occasion for young girls to relate to you when they come to your ER for an abortion complication why they came to the ER, as opposed to going back to the abortion doctor?

A Well, they – they perceived – they didn't like being there to start with, this – this whole process of being pregnant and then trying to hide it is not something that they're excited about or enthralled with, but I've had young ladies say the doctor didn't spend any time with me or the doctor didn't care, or the doctor didn't use gloves, or the doctor just treated me with such rudeness, and they didn't – there wasn't something there that attracted them to want to go back. There wasn't anything there relationship-wise

or connectedness-wise that made them want to go back, so they've come to the emergency room.

Q Have you in your career ever seen a woman present at your ER – not just adolescents, any woman – for an abortion-related complication related to a self-induced abortion?

A No.

Q Have you ever in your career seen a woman present at the ER with a complication related to an illegal abortion?

A No. I mean, my – my career has been since abortions have been legalized, I mean, so I've never seen – I mean, I started practicing medicine in '78. . . .

Q I suppose an illegal abortion might be one performed by somebody other than a physician.

A Yeah. I – I – I don't think I've ever had that happen.

TESTIMONY OF DR. FIGLEY

Q Dr. Figley, what types of stress, if you – could you tell us what – the general types of stress that occur in people's lives?

A Typically there are two, normative and catastrophic or traumatic.

Q Okay. Could you give us a couple of examples of normative stress?

A Normative stress is the stress that my family's going through now in anticipation of our youngest daughter leaving home and going to college, normal childbirth, entering and exiting of the family are quite normal, buying a new home, et cetera. And traumatic is a – an untimely death in the family when – anytime a child dies is certainly a traumatic event. A natural disaster, the – the kinds of disasters that have happened here in – in – in Alaska with regard to earthquakes are examples.

Q Doctor, what factors influence the severity and the intensity of traumatic stress for an individual?

A Among other things, it's associated with the amount of support, the degree of timing in terms of how old the person is, their degree of exposure to similar kinds of traumatic events, their self-awareness of their ability to survive and thrive under various kinds of circumstances, but much of it is really associated with social support, be able to provide an – an opportunity for the individual to process and work through the experience.

Q What does social support do for a person faced with traumatic stress?

A It enables the person to see things in a broader perspective, to be able to be in touch with their own natural coping abilities. It provides an opportunity to talk through and – and verbalize the anxiety that they feel. It enables them to receive solace and emotional support and love and caring in a time that they really need that.

Q Doctor, what's the normal social support for a minor who's faced with traumatic stress?

A The normal support of a minor is – are her – his or her friends, but especially her family, and lots of research

on social support, even through college students that are seniors, they identify their parents as the primary source of support.

Q Okay. As a social support resource, what does the family have going for it regarding giving social support to a minor?

A Mostly knowledge of that child. They're familiar with the various kinds of personality differences, the various kinds of – of ways in which they've coped in different kinds of circumstances, they can remind them of who they are, they can talk about the parents' experiences at that age. So it provides a broader perspective for them.

Q Do families in your opinion tend to stick with a child in – faced with traumatic stress regardless of the circumstances?

A Yes, they stick with the child no matter what the circumstances are. Even though they may initially be shocked and – and disappointed, they will come around, because there is a lifelong commitment long after the crisis is over.

Q Okay. Dr. Figley, in your opinion is an unexpected or unplanned pregnancy to a minor a traumatic event?

A Yes.

Q And is that a traumatic event to her family as well?

A Absolutely, yes.

Q Can catastrophic or traumatic stress influence a minor's decision-making ability? And let me qualify when I say minor. We may have been assuming just because we've

talked before, but just for the record I'm talking about girls 16 or younger in this context, okay?

A Yes, without a doubt. I mean, when you're exposed to a traumatic event, by definition it's extraordinary, unusual and leads to a sense of crisis and disbelief and panic, and, therefore, it's critically important for the parent and those who love and care for her to be around her and to provide that kind of support and perspective.

Q Doctor, getting back to our statute, in your opinion would most unemancipated minors benefit from the Alaska statute requiring parental consent for a minor's abortion?

A Yes.

Q And could you tell us a few reasons why you believe that?

A Primarily because they – it will encourage them, indeed, it will prevent avoiding exposing the parents to this reality. It will enable the parents to be able to support the child, to be familiar with her mental, as well as medical needs. It will help her in seeing all the various kind of alternatives, including abortion, and it will – among other things, there will be an opportunity to express their love and concern and – and – and support for her.

Q Doctor, are you aware of studies showing that when parents learn of an unplanned abortion for a minor child that they tend to actually support an abortion decision?

A Yes.

Q And what benefit can that bring to the minor if the parents are supportive of that?

A It will support them, among other things, for the rest of their life. As they, as all of us do, begin to think about the decisions they've made in their life and perhaps regret those decisions, they will feel a tremendous amount of support knowing that it wasn't just their decision they did alone, but – but, rather, a – a – a decision that was done with considerable thought and – and with the support of one's family.

Q Doctor, then you believe it would help in the way that a minor would not be taking the whole responsibility on herself for this decision, but would be sharing it with her family.

A That's right.

Q Doctor, you – have you had considerable experience, including clinical experience, with dealing with intrafamily violence?

A Yes.

Q And if we have a minor from a family that's experiencing intrafamily violence, what do you see their options would be under the parental consent act we're talking about?

A It's my understanding that there is – is the probability – not the possibility, the probability – of judicial bypass.

Q Doctor, are you aware of any research right now at this point showing that there are many minors who

actually suffer violence because of informing a parent of their unplanned pregnancy?

A No.

TESTIMONY OF MS. COLLETT

Q We were talking about your research regarding pregnancy and abortion rates in Texas after January 1 of 2000.

A Yes.

Q Can you tell us what you've done and what you found?

A One of the questions we had was what would be the effect of the parental notification law, if any, on Texas pregnancy and abortion rates, and whether there would be any effect, and so we looked to see what the Texas Department of Health showed, and as the expert witness report tells you, there are a couple of – of ways to – to measure that. One of the – the things that we learned is that there was a five-percent drop in '99 – from '99 to 2000 in Texas minors' pregnancies, from 26,117 to 24,665 pregnancies. Mothers age 10 to 17 accounted for 5.7 percent of births in 2000, compared to 6.1 percent in 1990. During that same year induced abortions performed on minors declined approximately 20 percent, from 4,798 in 1999 to 3,830 in 2000. This decline is substantially higher than an overall decline. We saw a decline in abortion in Texas throughout, which was a 5.4 decline in abortion on all Texas residents during 2000. I was interested to see if we saw that same sort of dramatic decline in this past year. Those were only recently posted to the Texas Department of

Health website. And the – the easier tables to look at are the table 14B, and those are perhaps the documents that you hold in your hand.

Q Yeah, I – perhaps at this point I could ask you to take a look at what's been marked as Defendant's 2273, and I have a copy for the Court.

THE COURT: Is this the new one?

MR. CLARKSON: This is the new one.

THE COURT: All right.

Q Can you tell the Court what that is?

A These are the recently-posted statistics on 2001 pregnancy/abortion statistics for the state of Texas.

Q When you say new, what does that mean?

A Well, compilation of all pregnancies, whether they were brought to term, whether they resulted in induced abortion by county, fetal deaths, et cetera.

Q When did this information first become available to you for review?

A The – this is printed from the website, and the – at the bottom of the page gives you when they were posted on – for example – oh, I beg your pardon. One of the tables was available December 16th, so. . . .

Q All right. And how does this information relate to the research and study you've done on pregnancy and abortion rates in Texas?

A Well, to the extent that there is a substantial decline in abortions and pregnancy, I wanted to see if it

was a continuing trend and – or whether it was a one-year decline, and – and what we see is in 2001 we see a continuing decline in pregnancy and a continuing decline in – in the – the number of abortions, but the decline in the number of abortions is not nearly as – as dramatic among teenagers. On table 14B, which is. . . .

Q What page. . . .

A . . . . the. . . .

Q . . . . are we on? What page are. . . .

A Table – let's see. If you turn to – let's see. It would be the one that says pages 1 of 8, about six pages in.

Q All right. It says preliminary Texas Department. . . .

A Yes.

Q . . . . of Health? Okay.

A This is women's ages 13 through 17, Texas 2001. This document doesn't include – this was last updated on December 17th of '02. It shows us that total pregnancy among women in Texas ages 13 to 17 were 23,416. That's a total decrease from 2000 of 1249, a five-percent decline in pregnancy over 2000. Still, a nice decline. And abortions continue to decline 3,555, a total decrease of two thou – of 247 or a decrease in abortion of six percent. Not that big decline we saw in the year 2000.

* * *

Q Now, have you had an opportunity to study and research voluntary parental involvement of young girls in their abortion decisions?

A Yes.

Q And what have you found in that regard?

A During our hearing when we were passing the – the act the Texas Family Planning Association presented a voluntary study of various Planned Parenthood organizations that showed 69 percent of minors in Texas involved a parent prior to obtaining an abortion.

Q All right. What do studies show regarding the reasons most young girls choose not to involve their parents in their abortion decision?

A The majority of girls are afraid of disappointing their parents.

Q What did, specifically, information reveal regarding voluntary parental involvement in Texas prior to the enforcement of the parental involvement law there?

A Again, while it varied from city to city, it – it showed that approximately 69 percent, which is higher than most of the published studies, but 69 percent after passage of parental notification. If the study from the payment of legal counsel and guardian ad litems reflects the number of bypasses, then we had a 95 percent parental involvement rate, so we increased our parental involvement significantly by the passing of our parental notification law.

Q Do you have an opinion as to whether or not that is a benefit to young girls pursuing an abortion decision in Texas?

A Absolutely. It certainly ensures that you have an adult that can assist them if there are any postoperative problems.

MS. CREPPS: Your Honor, I'm going to object to the witness getting into whether adults can assist and what rate. I think this has been excluded testimony.

THE COURT: Mr. Clarkson, would you like to move on?

MR. CLARKSON: I can move on.

THE COURT: All right.

Q Do you know of any cases in Texas, Professor Collett, where a young girl's abortion decision has been substantially or significantly delayed because of the parental involvement law, or the bypass, in particular?

A Not that I'm aware of.

Q Based upon your research and study of this issue, and based upon your experience with the Texas bypass process, do you have an opinion regarding whether mandatory parental involvement laws are important?

A Yes. As a matter of fact, they are. Appearing to be increasingly important in helping parents recognize the effect of adult men's involvement with their minor daughters.

Q All right. Let's move to another issue at this point and talk about have you had the opportunity to review and study the ages of the males who impregnate young girls, typically?

A There was a study in California by Mike Males that showed that two-thirds of all adolescent pregnancies were by men that were post-high school age, 20 or older. There's the study of journal – the Journal of Adolescent Health that indicates that two-thirds of all Alaska pregnancies under the age of 16 are the result of statutory rape, and in Texas we are concerned that, in fact, we have a similar problem, and that was one of the motivating factors of passing this particular law. . . .

Q Okay, let's. . . .

A . . . . as a matter of fact.

* * *

Q All right. What I was asking you was for your experience with parental involvement laws have you learned informed regarding the sexual exploitation of minors by older males, and I'm focusing on your Texas experience at this point in time.

A Yes.

Q And tell us what you've learned in that respect and how you learned it.

A We learned that there was a concern both in the committee, because as judges examine the – the girls and ask about the age of the partner about whether they're – they're being coerced into having an abortion, judges were concerned about the reporting duty. There was discussion about how judges were to handle that. There's a concern about we – we've also – I've also learned about it through press reports. As mentioned in my expert witness report the – the Planned Parenthood. . . .

* * *

Q Professor Collett, do you have any opinion based upon your experience, research and study regarding whether participation in judicial bypass proceedings benefits young girls who are contemplating the decision of abortion?

A Yes, I do.

Q And what is that opinion?

A I believe that, in fact, a bypass proceeding can benefit a minor in that allows her the opportunity to have an adult who is not involved in the process of, if you will, encouraging her to obtain an abortion, in evaluating her decision. If she's not going to have the benefit of a parent in guiding her through the decision-making process the judge can at least have the opportunity to help her evaluate her three options, the option of carrying the pregnancy to term and keeping the child, the option of carrying the pregnancy to term and giving the child up for adoption, or the option of terminating the pregnancy, and ensuring that she's thought through these options carefully and maturely, or in the event that she's not sufficiently mature and well informed, can ensure that not involving a parent is in her best interest and that terminating the pregnancy is in her best interest. The other thing that's important to recognize is that for the minor that's not sufficiently mature and well informed and is the victim of sexual or physical or emotional abuse, the idea of simply giving this minor an abortion and sending her back into a home where physical or sexual abuse is going on is not the right answer. It's very similar to situations that – that are tragically occurring, where the girl is given the abortion and sent back into the house to be abused again.

MS. CREPPS: Your Honor, I'm going to object because I think any opinions that she has on that particular topic are probably based on newspaper articles and. . . .

THE COURT: I'm going to sustain it. Lay a foundation for that part of the opinion.

Q Let's do this. Now, I want to ask you to assume that Judge Martin has testified in this case that in his view bypass proceedings have no purpose or value. Do you have a response to that?

A I think bypass hearings where a judge does not take the time to explore with the minor the basis for her decision and evaluate the various the options she has can have no value or meaning, but where a judge, in fact, informs himself of the options that the girl has before her and carefully explores with the girl the reasons that she chooses one option among the three options that she has, and explores with her the reason that she's choosing not to involve the parent, can be a very helpful process if she is sufficiently mature in confirming that choice, and if, in fact, she's not sufficiently mature, can protect her against the harm that she can suffer by impulsively choosing something that's wrong for her.

Q I want you to assume that Judge Martin has testified to the effect that the largest percentage of girls who pursued bypass in Minnesota complain of dysfunctional family situations. Do you have a response to that?

A In Texas, again, the primary basis for the application is that the minor is sufficiently mature and well informed.

TESTIMONY OF MR. ZIELINSKI

Q During the months of February and March 2002 did you participate in the conducting of a telephone survey for Life Dynamics?

A Yes, I did.

Q What was this telephone survey that was conducted?

A It was a survey of abortion providers across the United States, primarily those affiliated with Planned Parenthood and the National Abortion Federation.

Q What was your role in conducting this telephone survey?

A I monitored the conversation by listening to both sides of the conversation and tape-recording the conversations.

Q Who else participated in this telephone survey with you at Life Dynamics?

A We hired a girl who has the voice of a very young girl, and she was the caller in these.

Q And what was the relationship of the female caller to Life Dynamics?

A She was an employee.

Q What was the age of the female caller in reality?

A Twenty-four.

Q And how did the female caller identify herself when the telephone calls were made in the telephone survey?

A She identified herself as a 13-year-old, soon to be 14 years of age, who was involved with a 22-year-old man.

Q Anything else?

A I'm sorry?

Q Anything else?

A And she explained that she did not want her parents to know about the relationship, that she thought that she was pregnant, and in the course of that she was asking about abortion services, birth control provision.

TESTIMONY OF DR. ZABIN

Q All right. And the reason that teens have a tendency to engage in unprotected sex and to not think about protecting themselves with contraception is they simply don't know how to negotiate the health system in order to get the help they need.

A That's one of many reasons.

Q And the reason teens have a lack of ability to negotiate the health system is that they've never done it before?

A Very often that may be the case.

Q They lack the particular life experience associated with doing that?

A That is also possible.

Q You agree that it's true, don't you?

A Yes. I just want to make clear that none of these reasons are exclusive, that. . . .

Q Did you. . . .

A . . . . they are part of a large list of reasons. . . .

Q All right.

A . . . . yes.

Q But you agree with me that those are reasons.

A Oh, those are certainly included in the list.

* * *

Q Dr. Zabin, are you telling me you think young adolescents in Alaska are going to be aware of the state of the law regarding parental involvement and notification – consent in Alaska, and modify their behavior based upon that knowledge?

A Some adolescents.

Q You think it's possible some adolescents will do that?

A That they would change their behavior because of it?

Q Based on their knowledge that the law existed or didn't exist. . . .

A I would hope. . . .

Q . . . . whatever it is about. . . .

A I would assume that some would present at a clinic for some services if their knowledge was correct, rather than incorrect, yes.

Q Now, delaying decisions based upon misperceptions and misunderstandings, that is typical of adolescent decision making, is it not?

A Excuse me, delaying it based on. . . .

Q Misperceptions or misunderstandings. That's typical of adolescent. . . .

A That is one. . . .

Q . . . . decision making.

A . . . . of the reasons for delay.

Q It's typical of adolescent decision making.

A Misperceptions are typical of many ages, certainly of adolescents as well.

Q All right, so you agree it's typical of adolescents as well.

A Typical of adolescents as well, yes.

Q Dr. Zabin, you don't believe that public policy and law should be determined based upon the misperceptions of adolescents, do you?

A No, I do not.

Q Dr. Zabin, you agree, don't you, that the way in which a young girl will react to a situation and her mental/emotional ability to deal with a situation, one factor that affects that is her age?

A One factor, yes, but I do not believe that one can characterize the reaction by age.

Q Now, you've talked about how you think that adolescents, I guess in the United States, not just Alaska, have this concern that when they go to a health care provider their confidentiality is going to be breached.

A They appear – they tell us that that belief delays their attendance, yes.

* * *

Q Okay. Now, you told Ms. Novak that you thought in families where there are longstanding communication patterns parental involvement is a very positive thing for those young girls, correct?

A I'm afraid I have a basic prejudice in favor of intact families with good communication patterns. I – I certainly have in my research seen evidence that if those communications are to have an effect, they have to be longstanding, and what the girls and the mothers describe as easy.

Q All right, now, you told Ms. Novak that you thought one of the conclusions you could draw from your study, Exhibit 164, was that it could mean that parents, in fact, discourage abortion. Now, if you have girls in your study. . . .

A Now, it – I testified – I'm sorry, I – I'm not sure I testified to that effect. I remember testifying to the effect that it was quite possible that the parents might if forced into the discussion try to force abortion. Might, might not.

Q All right. Might attempt – let's ask it this way. If you have a family in which there's a longstanding communication pattern and the young girl talks to her parents,

and as a family they decide that the young girl will not have an abortion. . . .

A Uh-huh.

Q . . . . so it's a family decision in the context of a family

with a longstanding communication pattern, it's not a bad

thing, is it?

A No.

Q Family decisions for adolescents in which they have the support of quality parents is a positive thing, isn't it?

A Yes, in either direction.

TESTIMONY OF MS. FOSTER

Q In your experience as a prosecutor is this the usual situation, that parents are the ones who report these offenses of – offenses occurring to their daughter?

A To the extent that I'm aware of how law enforcement or social services becomes aware, the majority is parents reporting.

Q In your experience in this area is it common or rare for a girl to turn her boyfriend in, the adult boyfriend who is sexually abusing her?

A Rare.

Q Can the police use fetal tissues that would come from an abortion for DNA testing to identify who the father of the child is?

A Police can do that, yes.

Q And in your experience has that been done in the state – in Alaska in identifying sexual – sex offenders?

A I'm aware of cases where that's been done that I wasn't personally involved in, and cases that I have been involved in that's been an option to be considered.

Q Now, have you read the – Alaska's parental consent statute?

A Yes, I have.

Q Do you have an opinion on whether the Alaska parental consent statute would – whether or not it would increase the rate of reporting, by making parents aware of sexual abuse?

A I do.

Q Can you tell us what your opinion is?

A I believe that if parents were required to be notified and consent to an abortion, that that would increase the rate of reporting of cases in the category of sexual abuse of a minor in the second degree that you're discussing.

Q Do you have an opinion on whether or not the parental consent statute would help police in identifying offenders by the collection of fetal tissues from abortions with DNA testing?

A I'm sorry, I missed the first part of the question.

Q Would – do you have an opinion whether or not the parental consent statute would help the police to be able to identify the offender with the collection of fetal tissues from abortion for DNA testing?

A Yes, I do have an opinion.

Q And why do you think that would happen?

A I think it would increase it, and – and part of the reason is that the cases I'm thinking of in which they've considered getting fetal tissue from abortions is where the – the question of whether or not there's going to be an abortion is something that's not known for a certainty with the police, and so they're sort of watching the situation, hoping to be – to know about it in – in order to get the fetal tissue for testing. With the requirement for parental notification and involvement of parent in that, the likelihood would be increased that the law enforcement would be notified and be available to take the fetal tissue sample at the time of the abortion.

Q Do you have an opinion on whether or not the parental consent statute with [sic] help prevent sex offenders from coercing young girls to get abortions in order to hide their crimes? Do you have an opinion in that area?

A Yes.

Q And what is that opinion?

A To the extent that it would advise the parents that the child is sexually active and lead them to determine who the offender is and, based on my experience, put a stop to that, I believe it would have an impact on the amount of child sexual abuse that would be perpetrated after that point.

Q Do you have an opinion whether or not the parental consent statute would help law enforcement identify serial rapists and stop not only the continued sexual abuse of the girl who is impregnated, but other girls who as well could be victims of the offender?

A Yes.

Q And can you give us your opinion?

A My opinion is that it would have an effect on – it would have that effect of increasing the number of people who do this on a serial basis – it would have the effect of decreasing the number of people who have the opportunity to do this on a serial basis. My experience is that these – that often offenders who are targeting girls in this age group stay targeting girls in that age group until there's intervention of some kind.

TESTIMONY OF MS. SABINO

Q Ms. Sabino, the study that you talked about that you had conducted in Massachusetts. . . .

A Yes.

Q . . . . there was a quantitative portion and a qualitative portion to the study.

A That's correct.

Q In the quantitative portion of the study some 490 girls were interviewed by Planned Parenthood counselors when they first called the Planned Parenthood information hotline?

A We used the interviews that they conduct with young women who call the hotlines and took data from those. The interviews were not for the purpose of the study.

Q I understand, but the interviews occurred when the girls called the hotline.

A Correct.

Q All right, and there's about 490 girls?

A Correct.

Q And in the interviews the girls were asked questions such as why are you seeking not to tell your parents about your pregnancy or your abortion.

A Correct.

Q And in the qualitative study – smaller study, right?

A Correct.

Q There were about 26 girls who went through the bypass procedures that were personally interviewed, right?

A That's correct.

Q You didn't participate in those interviews.

A No, one of the other investigators.

Q And these girls were also asked how they would describe their relationships with their parents.

A That's correct.

Q And why they didn't want to tell their parents about their abortion decision or their pregnancy, right?

A Right.

Q Ms. Sabino, you're an activist against parental involvement laws across the country, are you not?

A Yes, I am.

Q Because you've gone to a number of states you've told the judge about previously. You've testified in legislatures, courts. Every time you do this you're against a parental involvement law.

A Yes.

* * *

Q All right, Ms. Sabino, in the qualitative study you conducted in Massachusetts 73 percent of the girls interviewed live with at least one of their parents.

A Yes, I believe that's correct.

Q And in the qualitative study one-half of the girls reported that they had position [sic] relationships with their parents.

A Yes.

Q Yet despite these positive relationships with their parents, these girls were, nonetheless, seeking to bypass their parents and obtain an abortion.

A That's correct.

Q So we know that at least half of the girls in the study were pursuing a bypass, trying to avoid parental

involvement, despite the fact of having very positive relationships with their parents.

A Yes, because many of them did not want to harm those par – positive relationships.

Q Right, and so the point. . . .

A Right.

Q . . . . that I'm making, and I think you're agreeing with me, is that most of the girls who sought bypass in your study had positive relations with their parents, but, nonetheless, tried to exclude their parents from the bypass and – the abortion and the pregnancy issue.

A In the 26 minors that had the qualitative interview, yes.

* * *

Q Ms. Sabino, in your study isn't it true that you found that 27.4 percent of the girls – I'm looking at page 43 of your study – when asked why they felt they could not tell their parents about the pregnancy indicated the parents would be extremely upset or upset?

A Yes.

Q Now, there was absolutely nothing in the answers that they were giving at that point that indicated that had anything to do with abuse or fear of abuse.

A Correct.

Q All right. And you indicated that a total of 22.4 percent said that they did not want to damage the relationship they had with their parents.

A That's. . . .

Q These. . . .

A . . . . correct.

Q These minors expressed concerns such as that their parents would lose trust in them, be profoundly disappointed because of high expectations, or no longer respect them.

A That's correct.

Q And, again, that had nothing to do with some sort of a dysfunctional abusive family. It just had to do with not wanting to disappoint the parents or lose trust of their parents.

A Right, that particular question did.

Q That's what I'm talking about.

A Right. I'm saying some minors gave more – a number of them gave more than one reason, but that particular codification was not. . . .

Q We're just taking them one at a time here.

A Right.

Q 22.2 percent gave a reason associated with their parents' ideological stances about abortion, pregnancy and with childbearing.

A That's correct.

Q Right. And that again has nothing to do with a dysfunctional family per se or abuse. It just has to do with parents having views about issues that children may not agree with.

A Right, but I – I guess – may – may I clarify? You're saying that the minor who said that did not fear abuse; is that the point you're making?

Q I'm saying your report reflected. . . .

A Because some of those minors may have also given the same answer about abuse.

Q Right.

A Particular minors gave – gave more than one answer.

Q And if we turn to page 44. . . .

A Right.

Q . . . . of your report, what you found was that 18.8 percent referenced some sort of an abusive situation.

MS. NOVAK: Your Honor, I'm going to ask if counsel's going to ask her to refer to specific tables and percentages that he offer to show the tables to the witness.

MR. CLARKSON: She seems to be answering per – fine. I guess. . . .

THE COURT: Do you need to see a copy of this?

A At this point I don't because I recall. . . .

THE COURT: All right.

A . . . . I recall generally. . . .

THE COURT: You recall. That's fine.

A . . . . those statistics. . . .

THE COURT: Okay.

A . . . . and I'm assuming you're reading the numbers that are on the page.

Q It was 18.8, only, that had been referencing some sort of an abusive situation.

A Yeah, I think – I think the words we use were ad – concerned with severe adverse consequences.

Q Severe adverse reaction?

A With severe – yes.

Q And, in fact, that's not even limited to abuse, is it? That's just a severe adverse reaction that could be something other than abuse.

A It invol – it was physical abuse, throwing them out of the house, emotional – severe emotional abuse.

Q Right, and the number of girls who said they feared physical harm was three?

A Yes.

Q And that's the quantitative study.

A That's the quantitative study, yes.

Q All right, now, if we go to the qualitative study, which is the interview with the 26 girls?

A Yes.

Q And looking at page 92 of the exhibit, 13 or half of the girls in the sample reported having a close or good relationship with one or both parents.

A That's correct.

* * *

Q Now, if a parent has a view, moral or religious, about abortion, you would agree with me, wouldn't you, there's absolutely nothing wrong with that parent talking to their child about that view?

A Correct.

Q It's a good thing when parents and children talk, right?

A Usually. Not always.

Q If they talk in a good family relationship, they have good communication, whether the parent is relating a religious view or a moral view about something, including abortion, it's not a bad thing.

A It depends on what the parent says, so I can't say whether it's a good thing or a bad thing.

Q Let's assume it's just a nice conversation. They're talking about the parents moral view of abortion or religious view of abortion.

A Can I repeat again, it depending – it would depend on what words the parents use. In most cases it would be fine. In some cases it could be very harmful.

* * *

Q Now, two-thirds to 75 percent of the girls in Massachusetts who get abortions do so with parental consent, don't they?

A I – yes. Those are roughly the figures.

Q All right. In fact, about 10 percent of the girls who go through bypass in Massachusetts have notified their

parents and the parents have refused to consent for abortions; that's the percentage in that respect.

A Approximately. We don't have a specific, but approximately.

Q It's a very small percentage.

A Correct.

Q Now, you told us earlier that the number of bypasses that are happening in Massachusetts now are about four. . . .

A Four-fifty to 500.

Q I thought I heard you say 400 to 450.

A I – I thought I said 450 to 500. . . .

Q I. . . .

A . . . . but I'm not sure.

Q Actually, you're correct, it was four – I wrote down 450 to 500. So if the rate of bypass is – now is 450 to 500, you testified in Florida in 1999 that the rate of bypasses was 550 to 500; is that correct?

A That's correct.

Q That was in 1999?

A That's correct.

Q And in the New England Law Journal, the article you wrote. . . .

A Right.

Q . . . . in 1991?

A '91, yes.

Q You said that the rate of bypasses at that time was about 900 to 1,000.

A That's correct.

Q So the rate of bypasses in Massachusetts has been steadily declining over time.

A That's correct.

* * *

Q Now, in Massachusetts from the '80s to the '90s the numbers of young girls giving birth in Massachusetts dropped, did it not?

A That's correct.

Q In other words, the teen birthrate went down.

A Yes, it did, as it did nationally.

Q And during the same time period the teen abortion rate in Massachusetts went down?

A I believe it did. You have to think about the number of young women who go out of state, because the Massachusetts abortion rate only reflects what you get from the department of public health those young women who had their abortions in Massachusetts. The teen pregnancy rate also only reflects those young women who had abortions and births in Massachusetts, so neither of them take into account young women who went out of state. However, nationally teen pregnancy, births and abortions did drop, and my understanding is that in Massachusetts the drop – the estimated drop is in line with the national trends.

APPENDIX B

DEPOSITION TRANSCRIPT SELECTIONS FROM *PLANNED PARENTHOOD OF ALASKA V. STATE* IN THE SUPERIOR COURT OF ALASKA, 2003, CASE NO. 3AN-97-6014 CIV.

TESTIMONY OF DR. BRIND

Q: Doctor, having reviewed this and looked at this study and from your own med analysis experience, was Dr. Daling's study, a methodologically sound one?

A: Yes, very much.

Q: What were the findings of her study about the increased risk, if any, of breast cancer for women who had induced abortions?

A: They found that overall women who had had an abortion were 50 percent more likely to have been diagnosed with breast cancer which would be a relative risk of 1.5. That's what they reported.

And in addition, they found that in certain subgroups of women, in particular women who had an abortion before the age of 18 or women who had an abortion over the age of 30, the relative risk was greater than two. So there was about over 100 percent increased risk for those women.

And for those women who had family history of breast cancer, so that is women who had a family history of breast cancer and a history of abortion, compared to women with a family history of breast cancer and no abortion, the overall increase was 80 percent rather than 40 percent in women who didn't have family history.

When they looked at women who had a family history of breast cancer and who had an abortion over the age of

30, there was 270 percent increase in the risk of breast cancer. And for women had an abortion before the age of 18 and who had a positive family history of breast cancer, they reported the statistic relative risk equals infinity because the only women who fit that reproductive history were women who were in the cancer group. There were no women who did not have cancer in their study population that fit that category.

Q: How many –

A: That was a total of 12 women.

Q: So 12. And all 12 of them in the study had breast cancer?

A: Yes.

TESTIMONY OF DR. ADLER

Q Regarding your studies, in contrast, early adolescents deal with both pregnancy and its termination by using denial.

Do you still think that's the situation?

A I think younger adolescents may tend to use avoidance as a strategy, avoidance and denial, more frequently. We don't have really strong data on that, but my guess is that may be true.

Q And you state that regarding middle adolescents – that's what we're talking about, 15, 16-year-olds, right?

A Right.

Q – were less able than older patients to anticipate their reactions. They experienced more post-abortion depression than they had expected.

A This was I think the study based on – was it the Hatcher study? – which was a very small number. And in larger samples and more representative samples, that hasn't been shown to be the case. Now, it may be that –

* * *

Q In your original draft report or your article, I was reading in your Florida testimony there was data regarding higher avoidance in the under-age-18 group. Was that finally included in your final draft?

A No.

Q And why didn't you include that, that showed a difference in avoidance in the under-age-18 group?

A Because the measure that we were interested in was a stress response, and the particular measure we used had two sub-scales: one is intrusion, which is intrusive thoughts after a stressful event. Intrusive thoughts are when you think about it and you don't mean to. Avoidance is choosing not to think about it. Avoidance is a more confounded variable, because there's also an avoidant coping style. And it may have been related to why they got pregnant in the first place.

So we consulted with the author of the scale that measured this and asked, Is it better to use both, or is intrusion a purer measure of stress response?

And he said that if you really want a pure measure of stress response, the intrusion measure is the better measure.

When you write something up for scientific publication, there is a premium on brevity because journal pages are valuable. So to have first included the data on avoidance and then explain why we think it wasn't necessarily a stress response but related to avoidant coping style would have taken too many pages to explain, so we took it out.

Q But wasn't your finding consistent with other sudies [sic] which show that minors have a greater tendency to engage in avoidance.

A Yes.

TESTIMONY OF DR. GREENE

Q. In this area of keeping a secret, secret abortion, how does that interplay with the child relationship with her family?

A. Well, in my experience keeping a secret from your family about a major life event or any kind of thing at the level of having an abortion would have to – if I were trying to keep that from my family, or if a teenager were, I take – I strike [sic] that if I were, if a teenager were trying to keep that from their family, they would be on guard more commonly, I would think, they would be suspicious of things the parents did ask, were they going to be discovered, and so I think it would cause a – an alteration of the family's relationships and relate – and their relating to one another.

* * *

Q. In an article which you published yourself listed in your CV, "Teen Pregnancy, New Initiatives for an Old

Problem", in this article did you cite concerns regarding increased risk for girls under the age of 16 – under – under the age of 16 regarding risks of trauma to the cervix caused by abortions?

A. Yes. Any procedure to an immature cervix, and a – again a – normally an 11- to 16-year-old cervix is not fully matured. So any kind of trauma or injury to the cervix would be more significant in someone that age.

* * *

Q. Regarding your experience working at Planned Parenthood clinics as you've indicated in your prior testimony, did you notice any difference in the way the doctors treated their parents, the abortion doctors, in their physician-patient relationship as compared to with what would be the relationship that you would usually – that you would have?

A. I think the difference in a clinic setting in which the physician is not the primary care provider who might have a long-term relationship with a young person is primarily related to their ability to relate to one another. In other words, if I have an adolescent for whom I provided care who has developed some degree of trust in me, they're much more likely to share information as well as to let me know when there's a problem as compared to the person who may see a young person only once, perhaps for a procedure that limits the amount of time and the – and the degree to which a relationship could develop. So, knowing the young person, knowing the medical history, and their other needs is important. And – and – and many times time is the only way you can do that and spend time with the young person.

Q. Based upon your observations of the Planned Parenthood clinic, did you have any concerns of the way the doctors – they're providing adequate postoperative care without parental involvement to these children they provided abortions to?

A. Just that it's – it's generally an issue. I – I – my impression again is that if I am doing or a person – a physician is doing a one-time procedure and may never see that young person again, then that's very different that [sic] a physician who's doing a procedure, caring for someone who will see them back, make sure they're doing fine and has a long-term relationship with them.

Q. Based upon your experiences working at the Planned Parenthood abortion clinics, did you find whether or not the clinic discouraged or encouraged minors to inform their parents of the – of the fact they were having an abortion?

A. Well, let me say it really wasn't just an abortion clinic.

Q. Uh-huh.

A. It was a combined clinic that provided teen contraception, too. So –

Q. Right.

A. – I don't know whether that's a semantic issue or not. And so it's important to – that there were a number of healthcare issues going on there. In general I think that the persons working at those clinics were not attuned to the need to provide parental involvement.

Q. And in your – your experience and your studies, if, in fact, you have situation where you're not encouraging minors to involve their parents, does that have an effect on whether or not they're going to involve their parents?

A. Yes, if you – I think that young people certainly can be swayed in that – in that area. Encouraging and talking about the positive reasons that a parent might be involved or should be involved I think will have an influence on the teenager.

* * *

Q. Can you explain to the Court the reasons why they give for not informing their parents?

A. The majority would simply say this, my parents will be upset, my parents will be angry. I think they have fears of the consequences of informing their parents, and so they are afraid often for their parents to know. They're embarrassed.

Q. And these consequences, are they concerned about – what are they prominently concerned about in these consequences?

A. Well, I think that most of the young people that I've counseled with, their parents don't either know or haven't accepted the young person's even sexually active, so the fact that they are then pregnant leads them to have more concern about what the parents will do. If I do something my parents disapprove of, they probably disapprove of my sexual activity, they're for sure going to disapprove of my being pregnant, and this is going to put an extra stressor on my parents. So, they are even concerned about their parents I think at times.

Q. And this involves the fact or fear of their parents knowing that they were actually sexually active?

A. I think that's part of it, sure.

* * *

Q. All right. Doctor, regarding a minor, again one of these children who go through abortion, is there a need for long-term emotional support in that abortion decision?

A. Yes. I – if – the decision meaning that if a young person had an abortion, or the decision they made to terminate, I think that they do need adults in their environment, and the parents are the closest to the young person. They do need emotional support. Because as we've talked about, young people may regret the decision they've made later. They may feel depressed, or act out, and that's a term that means adolescents often act out their feelings rather than expressing them, then parents need to be aware of signs to look for.

Q. Do you believe that parental knowledge and parental involvement in the abortion process would assist in providing that long-term emotional support?

A. Yes.

TESTIMONY OF DR. ELKIND

Q. Have you published articles or scholarly works in the area of cognitive development specifically?

A. Yes. It was the major area of my research in which I studied many – I first replicated many of the studies of John Piaget about intellectual development. And

I looked at religious development in young people; I looked at perceptual development, social-emotional development. And then – and I have tried to combine those developmental things with my clinical work, and talked about two concepts, which have been widely used: imaginary audience and personal fable in adolescents, which grew out of my work with delinquent children, which I found that many adolescents – young adolescents believe that they were the center stage, that everybody was watching them, thinking them [sic] about them and so on; and that led to an increased self-consciousness and increased susceptibility to peer pressure. And that's been replicated both here and abroad in many different ways.

And corresponding to that is a personal fabled belief that the young adolescent, that he or she is invulnerable and that – and have a sense of speciality, and that this has sometimes very positive effects but it can lead to risk taking when young people think that it's going to happen to other people and not to me; other people get sick and die, not me; other people are not going to realize their life's ambitions, not me.

And we recently developed a new scale to measure this, and are finding, again, as we found with our scale for them [sic] imaginary audience, that it peaks early in adolescence. The young people – imaginary audience is most powerful in early adolescence, and it appears that young people have this greater sense of vulnerability and speciality in early adolescence as well.

Q. All right. How does this specifically – what you just discussed, the scale and the thought processes of young people in that respect – how does that relate to the opinions you have in this case about Alaska law?

A. Well, it reinforces what we know from a lot of other domains, that it's a very special time of development, and that a lot of things are going on intellectually – Piaget pointed that out – that they are finding new mental abilities.

But it also leads to what I've talked about is a new level of egocentrism, self-centeredness; that is, a temporary stage that happens at each stage of development but that makes young people a little bit more realistic and more susceptible to pressures than – than they will be later one [sic].

Q. And in the context of this case, young women 16 years or younger who find themselves pregnant and considering the option of having an abortion or not having an abortion, how does this relate to them?

A. Well, I think what we know is that making these decisions means that you have to take a number of variable [sic] into account simultaneously, and to think about the social-emotional repercussion, the long-term effects, all of those things have to be taken into account. And we know that young adolescents are not able to do this as well as they well be able to do that later.

Q. Okay. What's the book The Hurried Child?

A. The book The Hurried Child is – was published – first published 20 years ago and reflects my concern with the pressures on contemporary young people to grow up too fast and the stress that produces on them. That book has been – is now in its third edition and was a best seller. It has been translated in ten different languages including Japanese, Chinese, and Korean.

Q. Okay.

A. And the thesis is basically that children are expected to feel and think and behave as older than they are. And when that happens, they – this is stressful. And we see increasing – evidence of increased stress. Like 25 percent of kids today show one or another stress symptoms, and that's an amazing number. Whether it's, in young children, physical symptoms; and school-age children, various learning problems; adolescents, we see it in the form of drug abuse, acting out, sexual acting out, or criminal behavior.

Q. And how, specifically, do those matters discussed in your book relate to the issue in this case, of 16-year-old girls who are – again, who are pregnant, finding themselves facing a choice of whether to abort or not?

A. Well, I wrote a succeeding book called All Grown Up and No Place to Go about adolescents. And the thesis of that book was that young people today are being asked to make decisions about sexual activity, about drug use at an earlier age than ever before; and that because of that, they are asked to make judgments at an age when their judgment is less adequate, when they are most susceptible to the personal fable and most susceptible to the imaginary audience, peer group pressure.

So a lot of the behavior that we see with adolescents, the misbehavior, comes with the fact that they are being pressured to make decisions at an age when they are less able to. Whereas before, adolescents didn't have to make those decisions until 17 or 18. Now they are being asked to make them at 12, 13, whether to have sex, whether to take drugs, and so on. And so we see a lot more stress and a lot more problem behavior because of that.

* * *

Q. Okay. Now I'd like to – you'd mentioned this briefly before, but I'd like you to elaborate a bit. Have you developed a scale to measure adolescent mental development?

A. Well, I – the imaginary audience the personal fable scales are both measures of development, yes.

Q. Can you tell us in more detail exactly what those scales are and how they fit to this case?

A. Yeah. The imaginary audience scale involves items such as you've been invited to a party, and you looked forward to going to that party for a month or so, and as you walk in the door, you notice that there's a grease spot on your skirt or pants, what do you do?

And what we find is that young kids, third or fourth grade, say, well I'll go to the party because I've been looking forward to it. And 16, 17-year-olds say, well, I'll go to the party, you know, I'll – my friends.

The 13, 14, 15-year-olds – we have this on tape as well – they say, well I'll go home; I'll hold any hand out, I'll spill something on it. They are very concerned about it and want to change it and so on, whereas the older and younger – and that's, again, that imaginary audience.

And that has been – that scale's been used across the country by many different investigators. It's been used overseas as well as, and with all similar results in Greece and Turkey and Israel.

Q. Now, what does that scale specifically tell you about the young girls who would be subject to this statute in Alaska? And how does it relate to your opinions in this case?

A. Well, I think that what we – other investigators have shown is that susceptibility to peer pressure, for example, is related to performance on the imaginary – if you're more high on the imaginary audience scale, you're more susceptible to peer pressure. And if that is so, then peer pressure – the pressure to have sex might be – one of the things we know is that the age at which young people have sex is a community-based norm, that – not certainly about parents, but the age in different communities and girls know at what age you're supposed to.

So if there's – if they're susceptible to peer pressure, and if in that community the age is fairly young, then that would certainly contribute to her becoming sexually active.

Q. Are there surveys that you've relied upon which corroborate the notion of teenagers having unrealistic expectations?

A. That –

Q. Corroborate the notion of teenagers having unrealistic expectations as you've –

A. I'm – either my hearing is going or I'm not following you.

Q. I'm wondering if there are surveys that you've relied upon in forming your opinions which corroborate the notion of teenagers having unrealistic expectations in their decision-making?

A. There are a number of studies. I think Susan Harter's work, for example, she's a long-time student fo [sic] self-development, and she's developed many scales, and her – is the sort of noted authority in the field. And

she believes that young adolescent girls and boys are – don't really have a good sense of self yet and not fully developed.

So that I think that, again, is further evidence for this kind of fact that it's a period when the – when Eric Erickson talked about the sense of personal identity is just being formed and that young people do not yet have a full sense of themselves and they are – which he found was that – sort of – she found stages in development, but that in early adolescence is when kids have contradictory ideas about themselves. They haven't yet integrated them. And so they have some ideas of, you know – that really don't fit together very well.

Q. Can you tell us how these unrealistic expectations of teenage girls 16 years or younger would come into play in the context of a young girl who finds herself pregnant considering abortion or not abortion?

A. Yeah. I think one of the things we see is that often young girls may have unrealistic expectations about the baby. And it's, you know, that the baby's just going to be loving and caring and it's going to be wonderful. They don't have – are not really aware of the crying and the changing diapers and staying up all night and all the other things. They have a very sort of idealistic unrealistic idea of what having a baby is going to be like.

APPENDIX C

TRIAL TRANSCRIPT SELECTIONS FROM NORTH FLORIDA WOMEN'S HEALTH AND COUNSELING *SERVICES, INC. V. STATE*, IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA, 1999.

TESTIMONY OF DR. ADLER

Q And it's an article in the Journal of Social Issues entitled, "Unwanted Pregnancy and Abortion Definitional and Research Issues." Do you see that?

A. Yes.

Q And is that your article?

A. Yes, it is.

Q Now, I want you to look to page 29 of that article.

A. Okay.

Q And ask you to – whether you still agree with this statement, quote, "Although differences may have not been empirically demonstrated, adolescents may be somewhat more likely than adults to experience negative responses following abortion for several reasons. One reason is that a relatively greater proportion of adolescents may terminate pregnancies that are, at least to some degree, wanted or intended. Adolescents may be more vulnerable than adults to pressure to abort, particularly for parents."

Do you still agree with that statement?

A. No, I don't. I do, in that I was using the term "may" and it was speculation. I think that's one of the

reasons we did the study that we did do, looking at whether adolescents were, in fact, showing more negative responses. Given the data that's come out since then, I don't think this speculation is borne out, so again, this was – given that I said the word "may," it is certainly possible, but the data now are suggesting that it's not the case.

* * *

Q Are you familiar with the Soderberg study in 1998 of Swedish women, of 1,285 women who had undergone abortion?

A. Silverberg?

Q Soderberg, S-o-d-e-r-b-e-r-g.

A. Not off the top of my head, no.

Q Would you look at number 11 of what we've attached?

A. Sure. Okay, yeah, I have it.

Q And you're not familiar with this study of 1,285 women specifically on the issue of their having undergone an abortion and the emotional distress that it caused?

A. Yeah, actually I have seen this. I haven't studied it particularly because it's a non-U.S. sample, but I have seen it.

Q I want you to look at the abstract of that study.

A. Sure.

Q And looking at page 173.

A. That's the abstract, or – I'm sorry, yeah, the abstract on page 173, right.

Q And I would ask whether that you would agree with the conclusion that, "Thus, 50 to 60 percent of women undergoing induced abortions experienced some measure of emotional distress, classified as severe in 30 percent of cases, and furthermore that emotional distress following induced" – then the citation to the Soderberg study, I'm sorry.

A. You know, what I'd need to review is what their measure of emotional distress was, whether they used a standardized measure, how it was characterized. I'm just trying to jump ahead to see if I could see what they used.

Again, in a non-U.S. sample, it's a little hard to know what their measures were.

I'm just looking actually at their methods selection, and it looks like they'd had a semi-structured interview and they were determining it on the basis of an interview. It doesn't look – they don't report any – they didn't use something like the Beck's Depression Inventory. You know, as I was talking about yesterday, it really – on [sic] of our criteria is you have to have some kind of standardizing measure to be able to benchmark it, and it looks, in looking through this, I don't see that they used that, so it makes their conclusions a little hard to evaluate.

Supreme Court, U.S.
FILED
AUG 5 - 2005
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No. 04-1144

IN THE

Supreme Court of the United States

◆

KELLY A. AYOTTE, ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE,
Petitioner.
v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *et. al.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF FOR AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the United States First Circuit Court of Appeals apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the *undue burden standard* cited in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) applied rather than the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?

2. Whether the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:.24-28 (2003) preserves the health and life of the minor through the Act's judicial bypass mechanism and/or other state statutes?

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a non-profit civil liberties education and legal defense organization devoted to preserving religious liberty, the sanctity of human life and traditional families. Liberty Counsel has worked on legislation, public policy and litigation throughout the country as part of its mission to preserve the Founding Fathers' commitment to the inalienable right to life. Liberty Counsel has also worked to protect the fundamental liberty interest of parents in the upbringing and direction of their children. The intersection of these issues in the present case creates a complex constitutional issue that will require thorough and thoughtful analysis to reach the proper balance of protected interests. Liberty Counsel respectfully submits this brief to assist the Court in its examination of these critical issues.

SUMMARY OF ARGUMENT

Long before this Court determined that there was a constitutional right to abortion it recognized that the fundamental right of liberty described in the Fifth and Fourteenth Amendment of the United States Constitution encompasses the fundamental right of parents to direct the upbringing of their children. *See Meyer v. Nebraska*,262 U.S.

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent of the parties are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

390, 399 (1923). These constitutional rights converge in New Hampshire's Parental Notification Prior to Abortion Act[2] (the "Act"). The Act balances parents' fundamental rights to direct the upbringing of their children with the right to seek an abortion by requiring that a parent of an unmarried, unemancipated minor be notified before her daughter obtains an abortion.

Because they integrate parents' fundamental rights with the right to seek an abortion, parental notification statutes such as New Hampshire's are in a different category and require different constitutional analysis than do statutes that regulate abortions for adult women. Since the Court can assume that adult women are mature enough to make an informed decision, it can uphold challenges to statutes restricting abortions for adult women solely on the basis that the legislation places an "undue burden" upon a woman's "choice." However, when the challenged statute is aimed at unmarried, unemancipated minors, then the assumption of maturity is no longer present, and the rights of the minor's parents become critical. Since state interference into the private realm of the family is seldom justified absent proof of harm,[3] a statute aimed at protecting parents' rights from interference is entitled to heightened protection against facial challenges. This Court has long afforded such heightened protection in the form of a stringent test that forecloses facial challenges unless "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

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[2] 2003 N.H. Laws 173, codified at N.H. Rev. Stat. Ann. § 132:24-28 (2003)

[3] *See Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990)

The *Salerno* test has been used to reject facial challenges to abortion laws. *Rust v. Sullivan*, 500 U.S. 173, 183 (1991), *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989). More notably, *Salerno* and similar stringent standards have been used to reject facial challenges to parental notification laws. *Ohio v. Akron Center for Reproductive Health* ("*Akron II*"), 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *H.L. v. Matheson*, 450 U.S. 398 (1981). This is in keeping with this Court's commitment to protection of the "private realm of family life which the state cannot enter." *Hodgson*, 497 U.S. at 447. As Justice Stevens has acknowledged, "The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part).

When this Court invalidated a spousal notification provision under an "undue burden" test in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992), it recognized that its conclusion

> is in no way inconsistent with our decisions upholding parental notification or consent requirements.[citations] Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart We cannot adopt a parallel assumption about adult women.

As Justice Scalia has stated, the *Casey* decision did not

overrule *Salerno* nor abrogate its role as the established test for facial challenges. *Janklow v. Planned Parenthood, Sioux Falls Clinic,* 517 U.S. 1174, 1178-1179 (1996) (Mem.) (Scalia, J., dissenting). In fact the *Casey* decision does not even mention the *Salerno* standard.

Nevertheless, the First Circuit determined that New Hampshire's parental notification statute should not be judged by the *Salerno* standard, but by the less strict "undue burden" test announced in *Casey.* Although the differences between parental notification statutes and other abortion regulations justify findings that the parental notification statutes are constitutional despite the holding in *Casey*, the First Circuit determined that New Hampshire's Act is unconstitutional under *Casey.* The First Circuit's failure to apply *Salerno* reflects a misapplication of relevant precedent from this Court. In addition, the First Circuit misapplied the *Casey* standard when it found that New Hampshire's parental notification law placed an "undue burden" on minors' rights to abortion.

ARGUMENT

I. THE "NO SET OF CIRCUMSTANCES" TEST OF *UNITED STATES V. SALERNO* PRESERVES THE BALANCE OF RIGHTS AND RESPONSIBILITIES BETWEEN THE COURT AND LEGISLATURES.

Far from being a "draconian" standard lacking in authority,[4] the "no set of circumstances" test described in

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[4] Michael Dorf, *Facial Challenges to State and Federal Statutes,* 46 STAN. L.REV. 235, 239 (1994).

United States v. Salerno, 481 U.S. 739, 745 (1987)[5] is, in fact, the culmination of years of precedents that balance the relative constitutional duties of the judiciary and legislature with the right of litigants to be judged by a valid rule of law. Maintaining the proper balance between these competing rights and responsibilities requires continued application of the *Salerno* test to facial constitutional challenges.

Despite one commentator's claim that *Salerno* is inaccurate and inconsistent with this Court's facial challenge cases,[6] the history of facial constitutional challenges both before and after *Salerno* demonstrates that it is "only the most famous of a line of cases applying virtually the same test" based upon institutional and federalism concerns.[7] *Salerno's* "no set of circumstances" test and similar standards address the institutional concern that Article III courts can decide only concrete cases.[8] *Salerno*'s concept of strictly limiting facial challenges also addresses the federalism concern that if a statute is capable of constitutional application, then courts should hold off constitutional judgments until it is known whether a construction adopted by state courts will protect

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[5] "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment." *Salerno*, 481 U.S. at 745.

[6] Dorf, *Facial Challenges,* 46 STAN. L.REV. at 238

[7] Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence,* 99 COLUM. L. REV. 173, 195 (1999).

[8] *Id.*

constitutional rights.[9]

By utilizing *Salerno* and similar standards over the years, this Court has made it clear that facial challenges are appropriate, if at all, only in exceptional circumstances.[10] Mirroring Chief Justice Rehnquist's statements in *Salerno,* the Court in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) said, "Respondents raise a facial constitutional challenge to § 954(d)(1), and consequently they confront 'a heavy burden' in advancing their claim." Facial invalidation "is, manifestly, strong medicine" that 'has been employed by the Court sparingly and only as a last resort." *Id.*

The reasoning behind the continuing validity of the *Salerno* test was best explained in *Younger v. Harris*, 401 U.S. 37, 52-53 (1971):

> The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). But this vital responsibility, broad as it is, does not amount

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[9] *Id.*

[10] Marc Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement,* 48 AM. U.L. REV. 359, 361 (1998).

> to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation it has been clear that, even when suits of this kind involve a 'case or controversy' sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes, [citations] ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided. In light of this fundamental conception of the Framers as to the proper place of the federal courts in the governmental processes of passing and enforcing laws, it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process.

Justice Scalia explained the dangers of discarding *Salerno*'s strict standard for one that would be more inviting

to facial challenges:

> Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting–through judicial decision–statutes that cannot be constitutionally applied in all cases covered by their language. And it prevents the State (or territory) from punishing people who violate a prohibition that is, in the context in which it is applied, entirely constitutional.

Ada v. Guam Society of Obstetricians and Gynecologists, 506 U.S. 1011 (1992) (Scalia, J., dissenting).

Viewed in historical context, *Salerno* and other cases imposing strict limits on facial challenges "reflect a conception of a federal judiciary limited to interfering with legislatures, particularly state legislatures, only when necessary to judge the constitutional rights of the parties to a particular case."[11] "The Salerno test...is based not on a simplistic policy of applying a statute as often as possible, but upon preservation of a proper balance between courts and legislatures."[12]

II. *SALERNO*'S "NO SET OF CIRCUMSTANCES" TEST IS THE PROPER STANDARD OF REVIEW FOR RESPONDENTS' FACIAL CHALLENGE OF NEW HAMPSHIRE'S PARENTAL NOTIFICATION LAW.

The *Salerno* test illustrates that in order to maintain a proper balance between competing individual rights and the

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[11] Note, *Stranger in A Strange Land*, 99 COLUM. L. REV. at 195.

[12] *Id.* at 197.

relative roles of the judiciary and legislature, statutes cannot be subjected to microscopic cleansing of all conceivable impermissible applications. Instead, a statute must be judged according to its terms and overturned on its face only when those terms contain an inherent infirmity regardless of particular applications. Such analysis is particularly apropos for abortion statutes which by their nature involve a conflict between personal and states' rights, and is absolutely critical for evaluating parental notification statutes which affect fundamental rights that predate the right to abortion.

A. The *Salerno* Standard Must Be Applied To Protect The Parents' Fundamental Right To Direct The Upbringing Of Their Children Inherent In The New Hampshire Law.

As the *Casey* court said:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 852 (1992). In addition, when the woman seeking an abortion is an unmarried unemancipated minor, there are consequences to her parents and to her continuing journey toward maturity.

Therefore, when a statute such as New Hampshire's addresses a minor seeking an abortion, it must necessarily balance the competing privacy interests of the pregnant woman described in *Roe v. Wade*, 410 U.S. 113 (1973), and the woman's parents, as established in *Meyer v. Nebraska*, 262 U.S. 390 (1923). Indeed, both before and after *Roe*, this Court has recognized "the fundamental liberty interest of natural parents in the care custody and management of their children." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). As Justice Scalia stated: "[A] right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men ... are endowed by their Creator.'" *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting). New Hampshire's parental notification statute protects these fundamental rights by requiring that a minor notify a parent before obtaining an abortion, while at the same time preserving the right of the minor to have an abortion.

Such a balancing of interests means that certain limitations which might otherwise be viewed as an impermissible restriction on abortion (such as the notification requirement) would be seen as reasonable in light of the competing parental interest. "[T]he holding in *Roe v. Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part). Therefore, a facial challenge to a law that protects both the right to abortion and the unique needs of a pregnant minor must be subjected to the exacting

scrutiny of the *Salerno* standard so as to avoid the kind of impermissible interference with state legislative process that this Court has been concerned about through the years. *See, e.g., Younger v. Harris*, 401 U.S. 37, 52-53 (1971).

B. This Court Has Used *Salerno's* "No Set of Circumstances" Test To Protect State Interests Against Facial Challenges to Abortion Regulations.

While *Salerno* dealt with a facial constitutional challenge to a bail reform act, its "no set of circumstances" test has not been limited to criminal laws. In fact, this Court has used the test described in *Salerno* to protect state interests against facial challenges to abortion laws.

Concurring in the Court's upholding of various provisions of Missouri's abortion law, Justice O'Connor said:

> Appellee's facial challenge to the constitutionality of Missouri's ban on public funding cannot succeed. There may be conceivable applications of the ban on the use of public facilities that would be unconstitutional, but some quite straightforward applications of the Missouri ban would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [relevant statute] might operate unconstitutionally under

> some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."

Webster v. Reproductive Health Services, 492 U.S. 490 522-524 (1989) (O'Connor, J., concurring).

Similarly, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court explicitly relied upon *Salerno* to reject a facial challenge to Title X funding restrictions against abortion counseling:

> Petitioners are challenging the facial validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) .

Rust, 500 U.S. at 183. Application of the *Salerno* standard in these cases was appropriate in light of the maxim that "[a]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Id.* at 190. "Under this canon of statutory

construction, '[t]he elementary rule is that every reasonable construction must be resorted to, in order to *save a statute* from unconstitutionality'."*Id.* "As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Id. Salerno*'s strict standard of review permits the Court to carry out that duty by ensuring that only laws which are inherently unconstitutional are declared facially invalid.

C. *Salerno*'s Strict Standard Of Review Best Represents This Court's Zealous Protection Of Parental Rights Against Facial Challenges To Parental Notification Laws.

As this Court recognized in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), *Salerno*'s "no set of circumstances" test preserves the elementary rule described in *Rust* by ensuring that only those statutes that are truly invalid on their face are found to be unconstitutional. After repeating the adage that where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality, the *Akron* court used the *Salerno* standard to reject a facial challenge to Ohio's parental notification law. *Id.* at 514.

"Because appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'"*Id.* "The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur." *Id.*.

While not explicitly referencing *Salerno*, this Court's other rulings rejecting facial challenges to parental notification statutes have utilized similarly strict standards of review aimed

at preserving the balance between the courts and legislatures. This Court's rejection of facial challenges to parental notification statutes also reflects the Court's zealous protection of the fundamental liberty interest of parents in the care, custody and management of their children.

"Three separate but related interests – the interest in the welfare of the pregnant minor, the interests of the parents, and the interest of the family unit – are relevant to our consideration of the constitutionality of [Minnesota's] 48-hour waiting period and the two-parent notification requirement." *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990). "The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Id.* "That interest, which justifies state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or entering military service, . . extends also to the minor's decision to terminate her pregnancy." *Id.* at 445. "Although the Court has held that parents may not exercise 'an absolute, and possibly arbitrary, veto' over the decision, [citations] it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent." *Id.*

> The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition. We have long held that there exists a "private realm of family life which the state cannot enter." Thus, when the government intrudes on choices concerning the arrangement of the household, this Court has carefully examined the governmental interests advanced and the

> extent to which they are served by the challenged regulation.

Id. at 446-447. "We think it clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent." *Id.* at. 448.

Similarly, in *H.L. v. Matheson,* 450 U.S. 398, 409 (1981), this Court rejected a facial challenge to Utah's parental notification statute, stating that, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. In addition, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 410. "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Id.* "Parents have an important guiding role to play in the upbringing of their children, which presumptively includes counseling them on important decisions," including the decision of whether to have an abortion. *Id.*.

As Justice Stewart said in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976),

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where

abortions for pregnant minors frequently take place. Justice Stevens added that:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State s interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.

Id. at 102 (Stevens, J., concurring in part and dissenting in part). In his dissent, Justice White made an even stronger case for protecting the interests of the parents when a minor is considering an abortion.

> The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here.

Id. at 95 (White, J., dissenting).

Therefore, when confronted with a conflict between a woman's privacy right as described in *Roe* and the parents' fundamental right to direct the upbringing of their children, this Court has consistently acted to preserve the state's interest in protecting parental rights. With few exceptions, the Court has acted to preserve the balance between the legislature and the courts by rejecting facial challenges to parental notification statutes.[13] This is consistent with *Salerno*'s strict limitation of facial challenges to those laws that are inherently unconstitutional.

D. This Court Has Acknowledged That *Casey* Does Not Affect Rulings Upholding Parental Notification Statutes Under The *Salerno* Standard.

The *Casey* decision did not mention, let alone overrule *Salerno*. More importantly, as the Court implicitly stated in *Casey*, nothing in that ruling diminishes the applicability of *Salerno* to parental notification statutes.

In invalidating Pennsylvania's spousal notification requirement, the *Casey* plurality specifically stated:

> This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. *Akron II*, 497 U.S. at 510-19; *Bellotti v. Baird*, 443 U.S. 622 (1979), (Bellotti II) and *Planned Parenthood*

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[13] Most recently, this Court upheld Montana's parental notification statute against a facial challenge based upon the fact that the statute used as a criteria for judicial by-pass whether notification was in the minor's best interest instead of whether the abortion was in the minor's best interest. *Lambert v. Wicklund*, 520 U.S. 292 (1997) (per curiam).

> *of Central Mo. v. Danforth,* 428 U.S. at 74. Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart We cannot adopt a parallel assumption about adult women.

Casey, 505 U.S. at 895. As Justice Stevens said in *Casey*, "Thus, we have upheld regulations of abortion that are not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision. *Id.* at 916 (Stevens, J., concurring in part and dissenting in part). Citing *Hodgson v. Minnesota*, Justice Stevens noted that, "While there are well-established and consistently maintained reasons for the Commonwealth to view with skepticism the ability of minors to make decisions...none of those reasons applies to an adult woman's decisionmaking ability." *Id.* at 918-919 (Stevens, J., concurring in part and dissenting in part). The state has a "legitimate interest in protecting minor women from their own immaturity." *Id.*

That legitimate state interest meant that the parental consent portion of the Pennsylvania law was constitutional, even though the spousal notification and other provisions were not. *Id.* at 899."Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." *Id.*

The Court's recognition of the continuing validity of parental consent/notification statutes even after the *Casey* ruling demonstrates that, contrary to the First Circuit's

conclusion in this case, *Casey* and *Salerno* are not mutually exclusive. In fact, the Fourth and Fifth Circuits have recognized that the *Salerno* test could easily accommodate the *Casey* "undue burden" test. *See Manning v. Hunt*, 119 F.3d 254, 269 (4th Cir. 1997) and *Barnes v. Moore*, 970 F.2d 12, 14 (5th Cir. 1992).

The Fifth Circuit upheld Mississippi's parental consent statute, noting that it was substantially similar to the Pennsylvania provision found constitutional in *Casey*. "Because the plaintiffs are challenging the facial validity of the Mississippi Act, they must 'establish that no set of circumstances exists under which the Act would be valid'." *Barnes*, 970 F.2d at 14. "In light of *Casey*'s holding substantially identical provisions of the Pennsylvania Act facially constitutional, the plaintiffs cannot satisfy this 'heavy burden'." *Id.* The *Barnes* court noted that "[t]he *Casey* joint opinion may have applied a somewhat different standard in striking down the spousal notification provision of the Pennsylvania Act, not in issue here. Nevertheless, we do not interpret Casey as having overruled, sub silentio, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes." *Id.* at n.2.[14]

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[14] As the First Circuit noted, numerous circuit courts have chosen to use *Casey* instead of *Salerno* as the applicable test for facial challenges to abortion statutes. I, *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 142-43 (3rd Cir. 2000) (invalidating New Jersey's ban on partial birth abortions), *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 194-97 (6th Cir.1997) (invalidating bans on certain procedures and a requirement of viability testing), *cert. denied,* 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir.1996) (invalidating regulations on abortions before 20 weeks gestation and essentially banning abortions after 20 weeks gestation) cert. denied, 520 U.S. 1274 (1997); *Planned Parenthood, Sioux Falls Clinic*

Justices Rehnquist, Scalia, and Thomas agree that *Casey* did not overrule *Salerno*.

> "Our traditional rule has been, however, that a facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied. The only exception to the rule recognized in our jurisprudence is the facial challenge based upon First Amendment free-speech grounds. We have applied to statutes restricting speech a so-called 'overbreadth' doctrine, rendering such a statute invalid in all its applications (*i.e.,* facially invalid) if it is invalid in any of them. While the *Roe* court seemed to apply an overbreadth approach, later abortion decisions

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v. Miller, 63 F.3d 1452, 1456-58 (8th Cir.1995)(invalidating several provisions of the South Dakota statute). All of these decisions recognize that this Court has not overruled *Salerno* and has not held that *Casey* displaced *Salerno*. Nevertheless, the appellate courts applied *Casey* instead of *Salerno* based upon preference or their belief that this Court "intended" to overrule *Salerno* but neglected to do so. In all but one case, the courts used the *Casey* standard to invalidate provisions similar to those struck down by the *Casey* court and therefore unlike the parental notification statute here or the parental consent provision found valid in *Casey*. In one case, *Miller*, the court looked at provisions that included a parental notification statute without a judicial by-pass provision. The *Miller* court did not recognize the critical differences between a parental notification/consent statute and a statute regulating adults' abortion decisions, as this Court did in *Casey*, and therefore failed to follow *Casey* in that respect. By contrast, the *Manning* and *Barnes* courts correctly noted the continuing deference given to parental consent/notification statutes even after *Casey*, and held that in those instances *Casey* has not overruled *Salerno*. *See Manning*, 119 F.3d at 268-269; *Barnes*, 970 F.2d at 14.

> have explicitly rejected application of an "overbreadth" doctrine. (*Ohio v. Akron Center, Webster, Rust v. Sullivan*). The Court did not purport to change this well-established rule last Term in *Casey*.

Ada 506 U.S. at 1011(Scalia, J., dissenting).

Similarly, in *Janklow v. Planned Parenthood, Sioux Falls Clinic,* 517 U.S. 1174, 1178 (1996) (Scalia, J.. dissenting), Justice Scalia said, "It has become questionable whether, for some reason, this clear principle [*Salerno*] does not apply in abortion cases." Since *Casey* did not so much as allude to the facial-challenge rule in *Salerno*, let alone overrule it, there is no basis to believe that the Court has purported to reject the *Salerno* standard, particularly in parental notification/consent cases. *Id.* at 1179.

Even in adopting the "undue burden" standard in *Casey* this Court recognized that the legitimate state interests in protecting parental rights and protecting minors from their own immaturity justify continued heightened review of parental notification/consent standards. Therefore, contrary to the First Circuit's conclusion, *Salerno*'s "no set of circumstances" standard continues to be the proper standard for judging facial constitutional challenges of parental notification laws.

III. NEW HAMPSHIRE'S ACT IS CONSTITUTIONAL EVEN IF IT IS ANALYZED UNDER THE "UNDUE BURDEN" STANDARD IN *PLANNED PARENTHOOD V. CASEY.*

When a plurality of this Court used an "undue burden" standard to invalidate certain provisions in Pennsylvania's abortion statute, it was also careful to explain that the

standard was not meant to have universal application. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 876-77 (1992). In particular, when an abortion regulation is not an effort "to sway or direct a woman's choice," but is "an effort to enhance the deliberative quality of the decision," then it is not facially invalid under *Casey. Id.* at 916 (Stevens, J., concurring in part and dissenting in part). The First Circuit erred when it failed to recognize this distinction which would have rendered the New Hampshire statute constitutional even under the *Casey* standard.

The *Casey* court found that the parental consent provision in Pennsylvania's statute was aimed at enhancing deliberations for pregnant minors rather than swaying their decision, and therefore was constitutional. *Id.* at 899. "Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." *Id.* The "right to choose" does not mean that the state is prohibited from taking steps to ensure that the choice is thoughtful and informed. *Id.* at 872. Justice Stevens agreed that the state may take steps to ensure that a woman's choice is thoughtful and informed, and that the states are free to enact laws to provide a reasonable framework for a woman to make "a decision that has such profound and lasting meaning." *Id.* at 916 (Stevens, J., concurring in part and dissenting in part). This is particularly true when the woman making the decision is a minor, since "there are well-established and consistently maintained reasons for the Commonwealth to view with skepticism the ability of minors to make decisions." *Id.* at 918. Justice Blackmun agreed that the state has an interest in encouraging parental involvement in the minor's abortion decision. *Id.* at 938 (Blackmun, J., concurring in part and dissenting in part).

As the plurality noted, "Not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Id.* at 873.

> The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Id. at 874 (citing, *inter alia*, *Hodgson v. Minnesota*, 497 U.S. 417, 458-459 (1990), *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 519-520 (1990) and *Webster v. Reproductive Health Services,* 492 U.S. 490, 530 (1989), cases upholding parental consent/notification statutes).

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.

Id. at 877. As Justice Stevens said, "A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification." *Id.* at 920 (Stevens, J., concurring in part and dissenting in part).

Therefore, "challengers of abortion statutes must prove in the first instance that either 'the legislature's purpose was to interfere substantially with a woman's abortion choice, or that a challenged regulation would impose a 'substantial obstacle' to the exercise of that choice.'"[15] "The existence of a substantial obstacle is calculated not by determining how the statute would affect all women seeking to obtain an abortion, but by evaluating its effect on the group for whom the law is a restriction."[16] "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[17]

Under *Casey*, therefore, "[A] regulation which is solely intended to be an obstacle to choice, or which has the direct effect of burdening choice, imposes an unconstitutional burden for that reason alone. If the regulation lacks such intent and has only an incidental or insignificant effect on choice, it is constitutional."[18]

Measuring New Hampshire's statute against the "undue burden" standard as enumerated in *Casey* and in the context of its status as a parental notification law leads to the inescapable conclusion that Respondents' facial challenge must fail. As was true with the parental consent statute upheld

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[15] Note, *Casey "Versus" Salerno: Determining an Appropriate Standard for Evaluating The Facial Constitutionality of Abortion Statutes*, 19 CARDOZO L.REV. 1825, 1835 (1998).

[16] *Id.* at 1836.

[17] *Note, Stranger in a Strange Land*, 99 COLUM. L. REV at pp. 176-177.

[18] *Id.* at 177.

in *Casey*, New Hampshire's statute seeks to enhance the minor's deliberative process. New Hampshire's Legislature, like Pennsylvania's, has taken steps to ensure that a minor woman's choice is thoughtful and informed, and is seeking to provide a reasonable framework for a woman to make "a decision that has such profound and lasting meaning." Since the women affected by New Hampshire's statute are minors, the state has "well-established and consistently maintained reasons" to view with skepticism the ability of minors to make decisions" and therefore an interest in encouraging parental involvement in the minor's abortion decision. *See, Casey*, 505 U.S. at 918, 938. The state has built in exceptions to the parental notification requirement, including a judicial by-pass provision, which illustrates that the state's interest is not in posing an obstacle to obtaining an abortion, but in ensuring that the abortion right is properly balanced with the parents' rights.

The ruling in *Casey* makes clear that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure. *Id.* at 899.[19] New Hampshire's statute, therefore, permissibly addresses the state's interests in the well-being of pregnant minors and their families. The fact that the parental notification statute might incidentally make it more difficult or more expensive for a minor to obtain an abortion (a fact which Respondents did not prove) does not invalidate the statute under *Casey*.

The First Circuit failed to engage in the analysis required under *Casey* for a parental notification law. In so

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[19] Amicus does not address whether New Hampshire's by-pass procedure is constitutionally adequate, which is beyond the scope of this brief.

doing, it ignored the state's long-standing interest in protecting parental rights and the well-being of minors facing a life-changing decision. As *Casey* made clear, the "undue burden" test did not jettison years of precedent which established that a woman's "right to choose" must be balanced, in the case of minors, with the parents' right to control the care and upbringing of their children. New Hampshire's law respects that precedent while also respecting the right to abortion described in *Roe,* and therefore is not facially invalid under either *Casey* or *Salerno.*

CONCLUSION

This Court's ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992) did not affect long-standing precedent. The standard described in *United States v. Salerno*, 481 U.S. 739 (1987) remains the proper standard of review for facial constitutional challenges to parental notification statutes.

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Supreme Court Of The United States

KELLY A. AYOTTE,

Petitioners.

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *et. al*,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,

in support of the *Petitioner*

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INTEREST OF THE AMICUS CURIAE[1]

The National Legal Foundation (NLF) is 501c(3) public interest law firm. Our donors and supporters have a vital interest in the abortion issue. They believe that states maintain the right to exercise the police power in support of protecting unborn children and that New Hampshire has reasonably attempted to do so.

SUMMARY OF THE ARGUMENT

The First Circuit improperly ignored this Court's facial challenge test from *United States v. Salerno*, 481 U.S. 739 (1987), and instead chose to analyze the New Hampshire Revised Statutes § 132:24-28 (2003), Parental Notification Prior to Abortion, under the undue burden test found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Salerno* has never been overturned. Furthermore, the facial challenge test is not *dicta* as has sometimes been asserted. However, should this Court disagree, it should recognize that the *Salerno* test is judicial *dicta* or much closer to judicial *dicta* than to *obiter dicta*, and therefore must be given precedential or nearly precedential value.

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[1] The parties have consented to the filing of this brief. Copies of the letter of consent accompany this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

ARGUMENT

The First Circuit upheld the trial court's (a New Hampshire District Court) order declaring unconstitutional, and enjoining the enforcement of, New Hampshire Revised Statutes § 132:24-28 (2003), Parental Notification Prior to Abortion (hereinafter "the Act"). *Planned Parenthood v. Heed*, 390 F.3d 53, 57-58 (2004).

In so doing, the First Circuit ignored this Court's facial challenge test from *United States v. Salerno*, 481 U.S. 739 (1987), and instead chose to analyze the Act under the undue burden test found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The First Circuit ruled that *Casey* has replaced *Salerno* for abortion cases and should control, even though this Court never overturned *Salerno, Planned Parenthood v. Heed*, 390 F.3d 53, 57-58 (2004), and held that the Act is facially unconstitutional. There are several interrelated issues before the Court in this case, however, this brief will only address the issue of which test is controlling when determining whether an Act is facially invalid.

I. THE FIRST CIRCUIT SHOULD BE REVERSED BECAUSE *SALERNO* HAS NOT BEEN OVERTURNED.

The First Circuit erroneously declared that *Salerno* had been superseded by *Casey* in the abortion context. *Id.* at 58. This Court has never explicitly overturned *Salerno,* and, as will be explained below, the federal courts of appeals do not have the authority to declare this Court's precedent overturned.

In *Salerno*, this Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully; since the challenger must establish

that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. The *Salerno* test has been applied to various statutory challenges throughout the years, including challenges to abortion statutes as recently as 2002. *See, e.g. Schall v. Martin*, 467 U.S. 253 (1984) (Sherman Anti-Trust case), *Pharmaceutical Research and Mfrs. of America v. Concannon*, 249 F.3d 66 (1st Cir. 2001) (Medicaid), *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (prohibited use of public facility for abortions), *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) (parental notification for abortion), *Greenville Women's Clinic v. Commissioner,* 317 F.3d 357 (4th Cir. 2002) (licensing standards for abortion clinics).

However, in *Casey* this Court passed over *Salerno* in silence and fashioned a new test. *Casey*, 505 U.S. at 876. Applying this new test, the joint opinion stated that "an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. In his dissent, Chief Justice Rehnquist explicitly noted that the joint opinion had failed to apply the *Salerno* test. *Id.* at 972 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

Then, in a memorandum respecting the denial of a petition for certiorari, Justice Stevens explained his view that the *Salerno* test is *dicta* and therefore not controlling. *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (Stevens, J.). According to Justice Stevens, the no set of circumstances test "was unsupported by citation or precedent. It was also unnecessary to the holding in the case . . . ." *Id.*

Finally, this Court had the opportunity to explicitly overturn *Salerno* post-*Casey* in *Stenberg v. Carhart*, 530 U.S. 914 (2000), but it did not.

The confusion regarding *Salerno* and *Casey* is not limited to the history laid out above. As will be explained immediately below, the courts of appeals have split into four

camps on the issue of the status of *Salerno* post-*Casey*. However, even those courts that have abandoned *Salerno's* facial challenge test in favor of *Casey's* undue burden test have consistently admitted that *Salerno* has not been overturned. *See, e.g., Women's Medical Prof'l Corp. v. Voinovich*, 130 F.3d 187, 194 (6th Cir. 1997) (summarizing how courts to that date had characterized *Salerno's* status).[2].

Seven courts of appeals have abandoned *Salerno* in favor of *Casey*, but their widely varied reasons for doing so are inconsistent. Four of the courts of appeals have decided that "[a]lthough *Casey* does not expressly purport to overrule *Salerno*, in effect it does." *Women's Medical Pro'. Corp.*, 130 F.3d at 194. *Accord Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1027 (9th Cir. 1999); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996).

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[2] In a dissent to the Sixth Circuit's opinion in *Women's Medical Prof'l Corp.*, Judge Boggs expressed frustration with the post-*Casey* decisions, as they have discarded *Salerno*, and clung to *Casey's* ambiguous language ensuring legislatures that they have the right to regulate abortion, but not clearly defining the parameters for such regulation. 130 F.3d at 218 (Boggs, J., dissenting).

> The post-*Casey* history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the *Peanuts* comic strip. Lucy repeatedly assures Charlie Brown that he can kick the football, if only *this time* he gets it just right. Charlie Brown keeps trying, but Lucy never fails to pull the ball away at the last moment.

Boggs implored this Court to bring clarity to the issue, and to provide guidance to the state legislatures as to what abortion regulations will be upheld as constitutional. *Id.* at 219.

Two of the Circuits, including the court below, have held that, while this Court did not overturn *Salerno*, the *Casey* decision simply "set a new standard for facial challenges to pre-viability abortion laws." *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 143 (3rd Cir. 2000) (citation and internal quotation omitted). *Accord, Planned Parenthood*, 390 F.3d at 58.

Finally, the Seventh Circuit declared that *Salerno* was merely a "suggestion" and could, therefore, be ignored. *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002). The Seventh Circuit essentially said that *Salerno* was mere *dicta*, and cited *Troxel v. Granville*, 530 U.S. 57, 85 n.6 (2000), for that proposition. However, the Seventh Circuit did not indicate that the passage cited in support of that proposition was not from this Court's opinion, but from Justice Stevens' dissent.

On the other side of the equation, two circuits have recognized *Salerno* as binding precedent on multiple occasions. The Fifth Circuit first dealt with the question in *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992), the same year *Casey* was decided, and held that this Court had not overturned *Salerno*. *Id.* at 14 n. 2. The Fifth Circuit reaffirmed *Barnes'* use of *Salerno* in *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1102-04 (5th Cir. 1997).

Similarly, the Fourth Circuit has held that *Casey* did not overturn *Salerno*, and declared that it was bound to apply *Salerno* as precedent until such time as this Court might explicitly overturn it. *Manning v. Hunt*, 119 F.3d 254 268 n.4 (4th Cir. 1997). The Fourth Circuit has reaffirmed this decision twice. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000); *Greenville Women's Clinic v. Commissioner*, 317 F.3d 357 (4th Cir. 2002).

Thus, at least technically speaking (and in several cases, more than technically speaking) none of the courts of appeals have declared that *Salerno* has been actually overturned. Nonetheless, to the extent that some of the courts of appeals *treated Salerno* as overturned, they

exceeded their authority. This principle is evident in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), in which this Court wrote that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* This principle has been expanded to include precedent that seems to have been overruled by implication. *See, e.g. Agostini v. Felton*, 521 U.S. 203 (1997); *State Oil Co. v. Khan*, 522 U.S. 3 (1997). For these reasons, this Court should hold that the First Circuit erred in ignoring the *Salerno* test.

II. THE *SALERNO* TEST SHOULD BE GIVEN PRECEDENTIAL OR NEAR-PRECEDENTIAL VALUE BECAUSE IT WAS NECESSARY FOR THE DETERMINATION OF THE CASE OR, IN THE ALTERNATIVE, BECAUSE IT WAS NOT MERE *DICTA*.

As noted above, Justice Stevens argued in his memorandum in *Janklow* that the *Salerno* test is not binding precedent, but only *dicta*. 517 U.S. at 1175. This is not the case, because, as will be explained, the passage in *Salerno* that contains the facial challenge test was necessary for the proper adjudication of the case. However, even should this Court decide that the passage is *dicta*, the First Circuit should still have given it deference or treated it as precedential because the passage is arguably judicial *dicta* rather than *obiter dicta*, and at a minimum it is much closer to the former than to the latter. Furthermore, this Court should similarly make its decision based upon the *Salerno* test.

A. The Passage Containing The *Salerno* Facial Challenge Test Was Necessary To The Adjudication Of The Case, And, Therefore, Was Not *Dicta*.

The facial challenge test in *Salerno* was not *dicta* because it was necessary for the adjudication of the case. *Dictum* is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999). The sentence that has been dismissed as *dicta* is the articulation of the general rule upon which the case was decided. When a court makes its ruling there are many different issues that it must consider. A holding that is necessary for the adjudication of a case is treated precedentially. *Id.* at 711. When a holding does not address the main issues in a case, but is still necessary for the court to reach its conclusion, that too should be treated precedentially. *Id.* After Chief Justice Rehnquist, writing for the Court, stated the rule in *Salerno*, he immediately proceeded to analyze the facts of the case accordingly to ascertain whether the test had been met. He concluded that the requirements of the test had not been met: "respondents have failed to shoulder their heavy burden to demonstrate that the Act is 'facially' unconstitutional." *Salerno*, 481 U.S. at 745. Because the facial challenge test set forth in *Salerno* was *the rule* upon which the case was decided, the test cannot be classified as *dicta*.

B. Even If This Court Were To Find the Passage In *Salerno* To Be *Dicta*, It Cannot be *Obiter Dicta* And Thus Deserves Precedential Or Near-Precedential Value.

However, because Justice Stevens found the *Salerno* test to be stated more broadly than he thought necessary, he argued in his memorandum in *Janklow* that the test was not

actually binding precedent, but only *dicta*. *Janklow*, 517 U.S. at 1175. This compels one to consider the definition of *dicta*. *Dictum* is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Quinn, *supra*, at 710. *Dicta* are often divided into *obiter* and judicial *dicta* to determine its precedential value. Id. at 712-13. *Obiter*, or mere, *dicta* is an opinion expressed in passing and has less persuasive value. *Id*. at 713. Judicial *dicta* are a "court's reasoned consideration and elaboration upon a legal norm" and have much more persuasive value. *Id*. at 713-14. Indeed, as will be explained, judicial *dicta* sometimes can and should be given precedential value.

Even if the *Salerno* passage is construed as *dicta*, it should still be given precedential value because it is judicial *dicta*. This Court heavily weighs judicial *dicta*. In *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996), this Court adhered to judicial *dicta*, which was regarded as a "well-established rationale upon which the Court based the results of its earlier decisions." Similarly, this Court has stated that the "principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989).

Likewise, the Third Circuit noted that "[a] . . . distinction has been drawn between 'judicial *dictum*' and 'obiter *dictum*': Judicial *dicta* are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to a decision. A judicial *dictum* may have great weight." *Cerro Metal Products v. Marshall*, 620 F.2d 964, 978 n.39 (3d Cir. 1980) *(citation omitted)*. Indeed, judicial *dicta* are of such consequence that some courts consider judicial *dicta* issued by supreme courts to be binding precedent: "A Wisconsin court has stated it thus: 'When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum

but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *Id.*

Furthermore, the distinction between *obiter dictum* and *judicial dictum* is not a bright line. Quinn, *supra*, at 717-18. Hard and fast divisions "are probably wrong" and can lead to "intellectual chicanery." *Id.* at 730, 776. It is not easy to determine what constitutes judicial *dictum*. *Id.* at 735. In fact, *dicta* are better thought of as being on a continuum. *Id.* at 740. Under this view, *obiter dicta*, in which a court has not deliberated over what it has said, *see id.*, rest at the lower end of the continuum. Judicial *dicta* rest at the upper end of the continuum because the court considers that what it has said will guide future litigation, *id.* at 730. Therefore, it is important under this view to realize that *dicta*, even *dicta* other than that which is *technically* judicial *dicta*, can lie very close to that end of the continuum and can be worthy of receiving precedential or near-precedential value. Certainly, at a minimum, that can be said of *Salerno's* "no set of circumstances" language.[3]

Thus, under any legitimate view, the *Salerno* test should be treated as controlling in the instant case.

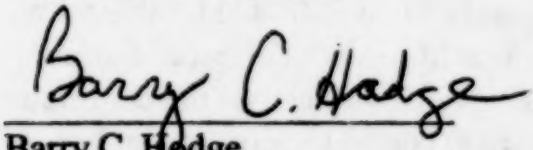
---

[3] This has not been changed by the post-*Casey* confusion, which is an analytically distinct question.

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Petitioner's brief, the decision of the First Circuit should be reversed.

Respectfully submitted,
This 8th day of August, 2005



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In The
Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND, CONCORD FEMINIST HEALTH
CENTER, FEMINIST HEALTH CENTER OF
PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

BRIEF AMICUS CURIAE OF NEW HAMPSHIRE LEGISLATORS IN SUPPORT OF PETITIONER AND IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS CURIAE[1]

Amicus is a group comprised of present and former New Hampshire legislators who support the Parental Notification Prior to Abortion Act, N.H. RSA 132:24-28 ("parental notification act").[2] The resolution of the present case will affect future regulations concerning abortion in the State of New Hampshire and throughout the United States. Amicus believes that its perspective will complement the brief of the Petitioner and assist the Court in its decision whether to grant the Writ of *Certiorari*.

SUMMARY OF ARGUMENT

The Courts of Appeals in the nation are in disarray when confronted with the question of what standard of review to employ for facial challenges to abortion regulations. Some require plaintiffs to show that "no set of circumstances exists under which the challenged Act would be valid". Others require a showing of unconstitutionality in a "large fraction" of the cases in which the Act would be applicable. Yet a third group have merely required a single case in which the statute would impinge upon the woman's constitutional liberty interest in terminating her pregnancy before declaring the law unconstitutional.

---

[1] No counsel for any party authored any portion of this brief. No persons other than amicus curiae, their members, or their counsel have made a monetary contribution to the preparation and submission of this brief. The written consents of the parties will be filed with the Clerk of the Court pursuant to SUP. CT. R. 37.3.

[2] This brief is submitted on behalf of John S. "Jack" Barnes, Jr., Carl R. Johnson, Maureen Mooney, Russell Prescott, Tony F. Soltani, Fran Wendelboe, and Phyllis Woods, present and former New Hampshire legislators.

"Liberty finds no refuge in a jurisprudence of doubt" as this Court observed in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 843 (1992). Yet uncertainty is the only responsible answer by a lawyer to the legislator's question, "How will the courts assess this piece of abortion legislation?" And this has been the situation for thirteen years. It is time for the Court to resolve this question.

Of particular importance is the application of the standard of review to parental involvement laws and the presence or absence of a health exception. "Although the Court has held that parents may not exercise 'an absolute, and possibly arbitrary, veto' over that decision [by a minor to terminate her pregnancy], it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent." *Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990) (citation omitted).[3] Notwithstanding this straightforward statement by the Court, three states' parental involvement laws have now been struck down due to the application of this Court's reasoning in *Stenberg v. Carhart*, 530 U.S. 914 (2000). It is imperative that the Court grant the writ of *certiorari* in this case in order to establish the necessity and scope of a health exception in a parental involvement law regarding abortion.

[3] *See also Lambert v. Wicklund*, 520 U.S. 292 (1997). "This case [does not] determin[e] the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." *Id.* at 296 n.3, *citing Bellotti v. Baird*, 443 U.S. 622 at 654 n.1 (1979) (Stevens, J., concurring). For an extensive review of Supreme Court precedent on this issue, see *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 361-67 (4th Cir. 1998).

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE UNCERTAINTY REGARDING THE STANDARD OF REVIEW TO BE APPLIED TO FACIAL CHALLENGES OF ABORTION REGULATIONS THAT HAS PERSISTED FOR THIRTEEN YEARS.

In 1987 this Court summarized the standard for assessing a pre-implementation facial challenge to a validly enacted statute:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenge must establish that no set of circumstances exists under which the Act would be valid. The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.

U.S. v. Salerno, 481 U.S. 739, 745 (1987). This test has been applied by the Court to the regulation of abortion a number of times. *See Rust v. Sullivan,* 500 U.S. 173, 183 (1991) and *Ohio v. Akron Ctr. for Reprod. Health,* 497 U.S. 502, 514 (1990). *See also Webster v. Reprod. Health Services,* 492 U.S. 490, 524 (1990) (O'Connor, J., concurring in part and concurring in the judgment).

Five years after *Salerno* this Court issued multiple opinions in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). With no reference to the *Salerno* standard, Justices O'Connor, Kennedy and Souter reviewed the challenged provisions of the Pennsylvania abortion statute

to determine whether the provisions created undue burdens on the woman's right to terminate a pregnancy in a "large fraction" of the cases involving the statute's applications. 505 U.S. at 895.

In the aftermath of *Casey*, several Justices have written separately to express their individual views on the proper standard of review for facial challenges, some agreeing with the *Salerno* characterization of the standard, others agreeing with the *Casey* characterization of the standard. *Compare Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (concluding that "*Salerno*'s rigid and unwise *dictum* has been properly ignored in subsequent cases") (Stevens, J., concurring in denial of certiorari), *with id.* at 1178-79 (*Casey* "did not purport to change this well-established rule") (quotation omitted) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari), *and Ada v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting from denial of certiorari). *See also Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., joined by Souter, J., concurring) (arguing that the "no set of circumstances" standard is incompatible with *Casey*).

A. The Recent Decision of this Court in *Stenberg v. Carhart* Has Exacerbated this Uncertainty.

In *Stenberg v. Carhart*, 530 U.S. 914 (2000) this Court reviewed a facial challenge to a Nebraska statute prohibiting the performance of particular abortion procedures. In considering the absence of a health exception to the statute, Justice Breyer, writing for the majority of the

Court, employed yet a third standard of review, "Nebraska has not convinced us that a health exception is 'never necessary to preserve the health of women.'" *Id.* at 938. Nowhere in the majority opinion does the Court address the reason for this inversion of the *Salerno* standard, requiring the state to show that the statute can always be constitutionally applied, instead of requiring the plaintiff to show that "no set of circumstances exists under which the Act would be valid." *See Salerno*, 481 U.S. at 745. Similarly absent is any reference to the *Casey* standard requiring the plaintiff to show that the statute operates unconstitutionally in a "large fraction" of cases. *Stenberg*, 505 U.S. at 1019-20 (Thomas, J., joined by Rehnquist, C.J. and Scalia, J. dissenting).

Judge Easterbrook has described the dilemma of the lower courts created by this Court's failure to explain its adoption of a third standard of review for facial challenges to abortion regulations:

> Indiana makes much of the fact that its [informed consent for abortion] statute has never been allowed to operate as written. It relies on *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), for the proposition that, except in first amendment cases, a law may be held unconstitutional only when "no set of circumstances exists under which the Act would be valid." Yet in *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), without so much as a mention of *Salerno*, the Court held invalid, in a pre-enforcement challenge, an abortion statute that might have been construed by the state courts to have at least some proper applications. This leaves us with irreconcilable directives from the Supreme Court. The Justices have insisted that courts lower in

the hierarchy apply their precedents unless overruled, even if they seem incompatible with more recent decisions. See, e.g., *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Rodriguez de Quijas v. Shearson/ American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). When the Justices themselves disregard rather than overrule a decision – as the majority did in *Stenberg,* and the plurality did in *Casey* – they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books.

A Woman's Choice – E. Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003).

B. Three Standards of Review are Currently Being Applied to Abortion Regulation by Lower Courts.

Prior to *Stenberg*, the federal courts of appeals were divided over the question of whether *Casey* modified the *Salerno* standard. The Fourth and the Fifth Circuits have continued to apply *Salerno*. "[W]e do not interpret *Casey* as having overruled, *sub silentio,* longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes." *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992), *cert. denied,* 506 U.S. 1021 (1992). *Accord Causeway Med. Suite v. Ieyoub,* 109 F.3d 1096, 1102-04 (5th Cir. 1997) ("As far as we can tell, the Court

appears to be divided 3-3 on the *Salerno-Casey* debate, and it would be ill-advised for us to *assume* that the Court will abandon *Salerno* because three members of the Court now desire that result"), *cert. denied,* 118 S. Ct. 357 (1997). The Fourth Circuit also applies *Salerno*.

> We begin by emphasizing, as we did in *Bryant I,* that the challenge to [the abortion clinic regulation] is a facial one and therefore "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). To show the necessary respect to legislative departments, particularly in light of Article III's limitation of judicial power to cases and controversies, we require evidence – as opposed to speculation – sufficient to rebut the regulation's presumptive constitutionality.

Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health & Envtl. Control, 317 F.3d 357, 362 (4th Cir. 2002), *cert. denied,* 538 U.S. 1008 (2003). *See also Manning v. Hunt,* 119 F.3d 254, 268-69, n.4 (4th Cir. 1997) ("the reasoning of the Fifth Circuit [regarding this lower-court conflict of authority] appears to be most persuasive").

Six circuits have applied the "large fraction" test of *Casey*. *See A Woman's Choice – E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (holding undue burden standard, instead of *Salerno* standard, applies in abortion context after *Casey*), *cert. denied*, 537 U.S. 1192 (2003); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142-43 (3d Cir. 2000) (same); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1025-26 (9th Cir.

1999) (same), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193-96 (6th Cir. 1997) (same), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (same), *cert. denied, sub nom*; *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995) (same), *cert. denied sub nom*.

Notwithstanding the Court of Appeals for the Tenth Circuit's prior adoption of the *Casey* standard for review of facial challenges to abortion regulations, that court recently applied the *Stenberg* test in its review of the emergency exception to a Colorado parental notice law. "Applying [the *Stenberg*] standard, if we conclude that the record shows that there is no genuine issue as to the material fact that the PNA will infringe on the ability of *any* pregnant woman to protect her health, we must hold the statute unconstitutional." *Planned Parenthood of Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910, 919 (10th Cir. 2002) (emphasis in the original). *See also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 923 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3338 (U.S. Nov. 24, 2004) (No. 04-703).

Similarly, the federal district court for Delaware applied the *Stenberg* test when reviewing a statute requiring a 24-hour waiting period prior to the performance of an abortion. "[W]hether the statute poses an obstacle to one Delaware woman or thousands does not change the constitutional analysis." *Planned Parenthood of Del. v. Brady*, 2003 WL 21383721 (D.Del. 2003).

Regardless of one's view as to what the proper test is for review of facial challenges to abortion regulations, it is increasingly difficult to avoid the conclusion that the

question of what standard of review should be applied to facial challenges of abortion regulations "cries out for [this Court's] review." *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1178 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE NECESSITY AND SCOPE OF A HEALTH EXCEPTION TO PARENTAL INVOLVEMENT LAWS.

The Courts of Appeals for the First, Ninth, and Tenth Circuits have interpreted *Stenberg v. Carhart*, 530 U.S. 914 (2000) as creating a *per se* requirement of a health exception to parental involvement laws. *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 58-59 (1st Cir. 2004), *petition for cert. filed*, (U.S. Feb. 22, 2005) (No. 04-1144); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 923 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3338 (U.S. Nov. 24, 2004) (No. 04-703); and *Planned Parenthood of Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910, 919 (10th Cir. 2002). Yet none of these cases involve laws banning any abortion procedure. The Idaho case involves an emergency exception substantially similar to that approved by this Court in *Casey*. The remaining two cases contain emergency exceptions virtually identical to the Minnesota statute reviewed and approved by this Court in *Hodgson v. Minn.*, 497 U.S. 417 (1990). Notwithstanding the absence of a health exception in the Minnesota statute, there is no evidence of any harm to Minnesota minors in the fifteen years the statute has been in effect.

The relevant precedent that should have guided the evaluation of the New Hampshire statute in the present case, as well as the Colorado Parental Notification Act in *Planned Parenthood of Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002) is *Hodgson v. Minn.*, 497 U.S. 417 (1990) since all three cases involved the constitutionality of parental notification laws. In *Hodgson*, this Court reviewed a Minnesota statute that provided in pertinent part:

> No notice shall be required under this section if:
>
> (a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice;

Id. at 426, n.7. Like the plaintiffs-respondents in the present case, plaintiffs in *Hodgson* challenged the sufficiency of the emergency exception.

> Subdivision 4(e) of the statute provides an exception for minors whose health is so endangered that her doctor can certify she will die within three days. Specifically, subdivision 4(a) states that no notice is required if the attending physician certifies the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice. By the terms of the statute, the procedure may be performed 72 hours after notice is mailed. But, unless the doctor can state the minor will die within those three days, it is presumed that there is sufficient time to notify the parents. This exception does not help minors whose health problems warrant immediate abortions but whose lives cannot be certified to be so imminently endangered.

Brief of Cross Respondents (Dr. Jane Hodgson, *et al.*), 1989 WL 1127353, at *15, n.29. Notwithstanding this challenge, this Court upheld the Minnesota law as a two-parent notification law with a judicial bypass. *See Hodgson* at 448-49.[4]

There is no legally significant difference in the emergency exceptions of the New Hampshire and Colorado statutes when compared with the exception contained in the Minnesota statute before the Court in *Hodgson*. The New Hampshire statute provides in pertinent part, "No notice shall be required under RSA 132.25 if: (a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." The Colorado Parental Notification Act provided an affirmative defense to liability under the Act when "[t]he abortion was performed to prevent the imminent death of the minor child and there was insufficient time to provide the required notice." *Planned Parenthood of Rocky Mountains Services*, 287 F.3d 910, 916 (10th Cir. 2002).

In *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 923 (9th Cir. 2004), the Court of Appeals for the Ninth Circuit rejected the health exception in a parental consent law as constitutionally infirm:

> "Medical emergency" is in turn defined as a sudden and unexpected physical condition which, in the reasonable medical judgment of any ordinarily prudent physician acting under the

[4] The continuing viability of *Hodgson* is evidenced by its citation in *Lambert v. Wicklund*, 520 U.S. 292 (1997) (per curiam).

circumstances and conditions then existing, is abnormal and so complicates the medical condition of the pregnant minor as to necessitate the immediate causing or performing of an abortion:

1. To prevent her death; or

2. Because a delay in causing or performing an abortion will create serious risk of immediate, substantial and irreversible impairment of a major physical bodily function of the patient.

Id. at 924, citing IDAHO CODE § 18-609A(5)(c)(i). However, as the district court held "sudden" can be construed to refer to the moment of diagnosis of the condition, not the condition itself; "unexpected" to the physician's inability to know precisely when the medical condition would become acutely emergent; and "abnormal" to the fact that in an ordinary pregnancy there is no need for an abortion. As thus interpreted, the statute is no more restrictive than the medical emergency provision upheld by this Court in *Casey,* 505 U.S. at 880. *Wasden*, 376 F.3d at 915.

Each of these regulations protects differing state interests than those at issue in *Stenberg*. As this Court has long recognized, parental involvement laws promote the health and safety of minors. Parents are far more likely to be able to identify and secure the assistance of ethical and qualified abortion providers. *Bellotti v. Baird*, 443 U.S. 622, 641 (1979) They are also able to "provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." *H.L. v. Matheson*, 450 U.S. 398, 411 (1981). These interests simply were not present in *Stenberg*.

At issue in *Stenberg* was an attempt to *ban* altogether a method of abortion. Such statutes are entirely different than parental involvement laws, which obviously do not purport to ban abortions, but simply seek to promote the interests of minors in having the benefit of parental involvement.

In fact, *Stenberg* itself repeatedly makes this distinction plain. *See Stenberg*, 530 U.S. at 930 ("The Nebraska law, of course, does not directly further an interest in the potentiality of human life by saving the fetus in question from destruction, as it regulates only a *method* of abortion") (emphasis in original) (quotation omitted); *id.* at 931 ("this Court has made clear that a State may promote but not endanger a woman's health when it regulates the *methods* of abortion") (emphasis added); *id.* ("Our cases have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks.") (emphasis in original). Thus, to the extent the Constitution requires a health exception, the requirement set forth in *Stenberg* is limited to those statutes which attempt to ban the abortion procedure altogether.

The application of *Stenberg* to parental involvement statutes generally is flawed in two ways. First, the decisions simply cannot be reconciled with a careful reading of what Justices O'Connor, Kennedy and Souter set forth in *Casey* or with the cases that preceded it. None of the lower courts applying *Stenberg* to parental involvement laws have meaningfully considered *Hodgson*. The lower court opinions make no attempt to explain how the Minnesota parental notification act somehow survived constitutional review, but the similar statutes do not. More fundamentally, the opinions are utterly devoid of any discussion of the important interests of minors in parental notification,

and fail to give any consideration to the reciprocal interests of parents and families, as set forth by Justice Stevens in *Hodgson* and endorsed by Justices O'Connor, Kennedy, and Souter in *Casey*.

Second, in spite of the *Casey* Court's acknowledgment that the Court previously had gone "too far" by "striking down . . . abortion regulations which in no real sense deprived women of the ultimate decision," *Casey*, 505 U.S. at 875, the lower courts are now rendering decisions that place even more restrictions on states than that in the pre-*Casey* era. Absent an intention by this Court – less than ten years after *Casey* – to overrule its prior recognition of the substantial state interest in potential life throughout pregnancy, it is imperative to clarify the requirement of a health exception in *Stenberg*.

CONCLUSION

For all the foregoing reasons, this case warrants the exercise of this Court's *certiorari* jurisdiction. Amicus respectfully urges this Court to grant the petition for Writ of *Certiorari*.

Respectfully submitted,

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In The Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL
OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND, CONCORD FEMINIST HEALTH
CENTER, FEMINIST HEALTH CENTER OF
PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF NEW HAMPSHIRE LEGISLATORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Sabri v. United States, 541 U.S. 600 (2004) 20

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Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective*, *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTIONS 20 (MaureenPaul et al., eds. 1999) 27

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STATEMENT OF INTEREST OF *AMICUS*[1]

Amicus is a group comprised of New Hampshire legislators, both past and present, who support the Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 ("parental notification act"). A complete listing of participating legislators is provided as appendix "A." The resolution of the present case will affect future regulations concerning abortion in the State of New Hampshire and throughout the United States. *Amicus* believes that its perspective will complement the brief of the Petitioner and assist the Court in the resolution of the issues.

STATEMENT OF FACTS

Amicus adopts the statement of facts in petitioner's brief.

SUMMARY OF ARGUMENT

This case presents issues of whether respondents may facially challenge a law requiring parental notification of abortions by minors on the basis of speculative injuries, and if so, what standard of review the courts should employ in reviewing the law.

Three foundational and interrelated concepts of the constitutional structure are presented – constitutional and prudential standing; the standard of review for abortion regulations; and severability. Each of these concepts bears upon the constitutionally-ordained separation of powers between the judicial and legislative branches. In this particular case, a sound understanding of these foundational constitutional concepts requires the courts to sustain the New Hampshire legislature's careful balancing of an

[1] No counsel for any party authored any portion of this brief. No persons other than *amicus curiae*, their members, or their counsel have made a monetary contribution to the preparation and submission of this brief. The written consents of the parties will be filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

asserted liberty interest in maturing minors' seeking to obtain abortions with the universal and historically recognized right and obligation of parents to direct the medical care of their minor children.

First, the abortion providers challenging the New Hampshire law have failed to establish an actual case or controversy. Providing only general statements regarding those who seek their services, and broad descriptions of medical conditions suffered by a small number of women of unspecified ages, they demand a ruling that the New Hampshire law is unconstitutional. The lower courts accepted the respondents' generalities and inferred the necessary injury to establish respondents' Article III standing. By doing so, they disregarded this Court's repeated admonition that plaintiffs must show a concrete and imminent injury to establish a right to invoke the authority of federal courts. The lower courts then misread this Court's requirement that laws proscribing methods of abortion include a health exception and struck down the New Hampshire law, ignoring the fact that this Court "has never challenged a State's reasonable judgment that [a minor's abortion] decision should be made after notification to and consultation with a parent." *Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990) (Stevens, J. concurring).

Second, the lower courts arrived at their erroneous conclusions by applying a *per se* rule regarding the necessity of a health exception to any abortion regulation. In doing so, they reversed the *Salerno* presumption of constitutionality which requires "the challenger [to] establish that no set of circumstances exists under which the Act would be valid." *See United States v. Salerno*, 481 U.S. 739, 745 (1987). *Salerno*'s presumption lays down a broad, context-neutral standard of review that should be followed even-handedly in *all* constitutional cases, whether or not they involve abortion regulations. It reflects an appropriate and longstanding recognition by the courts that the other branches of government must be assumed to act constitutionally and the courts are bound to "save" a statute, to the

extent reasonably possible, from a challenge to its constitutionality. The lower courts, however, shifted the burden of proof to the state of New Hampshire to establish that the Act would be valid in *all* circumstances. "Even if these statutes could be cobbled together to preclude all civil and criminal liability for medical personnel who violate the Act's notice requirements in order to preserve a minor's health, we would not view them as equivalent to the constitutionally required health exception." *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 61 (1st Cir. 2004). *See also Planned Parenthood of Northern New England v. Heed*, 296 F.Supp. 2d 59, 65 (D.N.H. 2003). By adopting a standard that requires virtually perfect legislation in a politically divisive area riddled with plurality opinions by this Court, the lower courts allowed a few dissenting individuals to defeat the state political process from expressing the views of the New Hampshire legislature and citizens regarding the proper balance between an asserted liberty interest of minors seeking to obtain abortions without informing their parents, and the constitutional right of parents to direct the medical care of their children.

Third, the lower courts also departed from sound constitutional traditions by ordering an improper and unwarranted "remedy" that, again, upsets the Constitution's allocation of legislative and judicial powers. Such intrusion into the political process again reflects a mistaken conception of the judicial role and is unwarranted by the precedents of this Court.

ARGUMENT

I. ABORTION PROVIDERS LACK STANDING SINCE THEY HAVE FAILED TO SHOW ANY CONCRETE IMMINENT INJURY CAUSED BY THE NEW HAMPSHIRE PARENTAL NOTIFICATION ACT.

"[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he

personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. . . .'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 at 472 (1982). The requirement that the party bringing suit "must show that the action injures him in a concrete and personal way" is "not just an empty formality," but serves several significant purposes: "[i]t preserves the vitality of the adversarial process," helps ensure that "the legal questions presented [will] be resolved in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," and "confines the Judicial Branch to its proper, limited role." *Lujan,* 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in judgment) (quotation marks omitted). Respondents ("abortion providers") have failed to meet this constitutional minimum.

The Court of Appeals for the First Circuit found the respondents to have standing on the basis of *Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 62 (1976). *Heed*, 390 F.3d 53, 56 n.2 (1st Cir. 2004). However the plaintiffs in *Danforth* challenged a comprehensive regulatory scheme containing a written consent requirement for every abortion, including those of adult women. In contrast, the abortion providers in this case seek only to challenge the emergency exceptions to a limited law applying only to minors seeking abortions. This narrow challenge does not result from any injury in fact to the respondents suitable to confer article III standing.

The physician-plaintiffs in *Danforth* established their standing to challenge most of the requirements of the Missouri statute by virtue of the fact that they were performing abortions at the time the lawsuit was initiated. *See id*. at 56-57, 62 & 66-67. (The Court declined to address the standing of the plaintiff abortion clinic. *Id.* at 62.) Similarly in *Doe v. Bolton*, 410 U.S. 179 (1973) the evidence established that plaintiff-physicians were "licensed physicians who wish to perform or counsel performance of legal abortions" challenging comprehensive abortion regulations. *Doe v. Bolton*, 319 F.Supp. 1050 (D.C. Ga. 1970). Perhaps more

importantly in *Doe*, and unlike the present case, the doctors were joined in their suit by Mary Doe a pregnant woman who was seeking an abortion prohibited by Georgia law. 410 U.S. at 185-86. In addressing the standing of the plaintiff-physicians, this Court wrote:

> Inasmuch as Doe and her class are recognized, the question of whether the other appellants – physicians, nurses, clergymen, social workers, and corporations – present a justiciable controversy and have standing is perhaps *a matter of no great consequence*.

Id. at 188 (emphasis added).

This case is thus easily distinguishable from *Danforth* and *Doe*, for two reasons. First, there is no minor plaintiff in the present case. Rather the New Hampshire law is challenged by three abortion clinics and one physician. Second, unlike plaintiffs in *Danforth*, abortion providers in the present case are not now performing, nor do they claim to have ever performed, abortions of the type which are the basis of their challenge to the statutory provisions at issue, namely emergency abortions for minors without parental notice. They therefore have not shown a "sufficiently direct threat of personal detriment" to establish Article III standing to sue. *Id.* at 188.

A. THERE IS NO EVIDENCE ABORTION PROVIDERS HAVE EVER TREATED MINORS WITH HEALTH CONDITIONS REQUIRING IMMEDIATE ABORTIONS.

In the complaint initiating this case, each of the abortion providers allege that "[a]mong [the individual plaintiff-respondent's] patients are unemancipated women under the age of eighteen who need abortions. [The individually named plaintiff-respondent] sues on its own behalf and on behalf of its minor patients." Complaint, ¶¶ 8-11. The complaint also contains an assertion that *women* [of an undisclosed age] experience various conditions that necessitate immediate abortions. *Id.* at ¶ 25 (emphasis added). Yet the evidentiary record, comprised only of the affidavits of

the complaining abortion providers, fails to include any evidence of respondents having ever treated a minor experiencing any health conditions necessitating an immediate abortion or threatened with death absent the performance of such an abortion.

Based upon pure speculation that 1) such health conditions could arise in a minor, 2) the minor would not be accompanied by a parent, 3) the minor would seek treatment from one of the three respondent abortion clinics or respondent physician, 4) the proper therapeutic response would be an immediate abortion, and 5) the minor would consent without involving a parent in her decision, the courts below ruled that the New Hampshire Parental Notification Act was unconstitutional. This speculative chain of events is clearly inadequate under Article III to support standing to assert a facial challenge to the New Hampshire law.

The abortion providers' claim in this case is similar in its deficiencies to that asserted by the minor in *H.L. v. Matheson*, 450 U.S. 396 (1981) or the childless married couple, "the Does," in *Roe v. Wade*, 410 U.S. 113 (1973). In *Matheson*, a fifteen-year-old minor sought to challenge Utah's parental notification law. However she did not allege nor establish that she was mature, nor did she establish any reason why notice to her parents would not be in her best interest. Similarly, the record did not establish that the abortion provider believed that notifying her parents would have adverse consequences. In fact, nothing in the record showed that the physician had any information about appellant's parents or familial situation, or even that he had examined appellant. *Id.* at 415. Therefore, this Court found that the minor had failed to establish standing to challenge Utah's law. *Id.* at 407.

In *Roe v. Wade*, the Does sought to challenge the Texas abortion law on the basis that Mrs. Does' health would be endangered if contraceptive measures were to fail and she were to become pregnant. She claimed that she would then desire, but be precluded from seeking a legal abortion by

Texas law. This Court recognized the Does had no standing and refused to hear their claim.

> This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy.

Id. at 128.

In the present case, no pregnant minor in New Hampshire may experience any serious health condition; or the minor may not seek treatment from one of the three respondent abortion clinics or respondent physician; or the minor experiencing the adverse health condition may be accompanied by a parent; or the proper therapeutic response may not be an immediate abortion; or the minor may not consent to the abortion. "Any one or more of these several possibilities may not take place and all may not combine," yet all are necessary for the abortion providers to be confronted with the need to perform an abortion that is not within the explicit terms of the New Hampshire law.

The evidentiary record provided by abortion providers is even more tenuous than the record found to be insufficient for Article III standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Unlike the plaintiffs in *Lujan*, the abortion providers have introduced no evidence of past conduct that is the subject of their challenge to the law. *See id.* at 562. Assuming *arguendo* that such evidence could be inferred from the statements within the abortion providers' affidavits, it is still insufficient to establish Article III standing.

> As we have said in a related context, "'Past exposure to illegal conduct does not in itself show a

> present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Lyons*, 461 U.S., at 102, 103 S.Ct., at 1665 (*quoting O'Shea v. Littleton*, 414 U.S. 488, 495-496, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974)). And the affiants' profession of an "inten[t]" to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough. Such "some day" intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the "actual or imminent" injury that our cases require.

Id. at 563-4.

The opinions of the lower courts should be reversed and the district court directed to dismiss the claims of respondents due to their lack of standing.

B. DR. GOLDNER HAS FAILED TO ESTABLISH INJURY IN FACT.

The declaration by Dr. Goldner, relied upon by the district court for the determination that "certain medical conditions during pregnancy require immediate abortion to protect the health of the mother and that any delay would jeopardize her health," *Planned Parenthood of N. New England v. Heed*, 296 F.Supp. 2d 59, 65 (D.N.H. 2003), fails to establish anything beyond the general safety of abortion and the limited existence of certain health risks which may or may not affect minors and if so, may or may not be experienced by a patient of Dr. Goldner's. There is no evidence in the record that Dr. Goldner has ever treated a minor patient suffering from any of the conditions described in his declaration or that it is reasonable to believe that any future minor patient of Dr. Goldner will suffer from such conditions.

The experience in other states is instructive on this last point. During 2000, the first year the Texas Parental

Notification Act was implemented, 3,830 minors obtained abortions in Texas. During the same time period, the Texas Department of Health received no certificates of abortions performed upon minors under emergency circumstances. Such certificates are required by Tex. Fam. Code § 33.002(a)(4)(B) if a physician performs an emergency abortion. *See* Teresa S. Collett, *Protecting Our Daughters: The Need for the Vermont Parental Notification Law*, 26 Vt. L.Rev. 101, 126, n.126 (2001). Idaho public records reflect a similar lack of emergency abortions. *See id.* at 124-25. This point is developed more fully in the *amicus* brief submitted in this case on behalf of The Thomas More Society.

The experience of Texas and Idaho, particularly when viewed in light of the silent evidentiary record as to any actual health complications suffered by any of Dr. Goldner's patients, establishes the purely speculative nature of his case. In considering whether a prospective plaintiff has satisfied the "injury in fact" prong of Article III standing, the Court has always demanded a fair amount of common-sense realism: "unadorned speculation will not suffice to invoke the federal judicial power." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976); *see also Whitmore v. Ark.*, 495 U.S. 149, 155 (1990) (collecting cases holding that speculative future injury will not satisfy injury in fact).

In the final paragraph of his affidavit Dr. Goldner asserts "[t]he Act thus places me in fear of prosecution for fulfilling my duties as a physician, which is to proceed with my patient's safety as my paramount concern." This Court has made it clear that one challenging the validity of a criminal statute must show a threat of prosecution under the statute to present a case or controversy. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979); *Wooley v. Maynard*, 430 U.S. 705, 711-12 (1977); *Ellis v. Dyson*, 421 U.S. 426 (1975); *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974); *Younger v. Harris*, 401 U.S. 37, 41-42 (1971). The threat of prosecution must be "credible," *Babbitt*, 442 U.S. at 298, and "alive at each stage of the litigation." *Ellis*, 421 U.S. at 435. "[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate

plaintiffs." *Younger*, 401 U.S. at 42. A litigant must show more than the fact that state officials stand ready to perform their general duty to enforce laws. *Poe v. Ullman*, 367 U.S. 497, 501 (1961); *Watson v. Buck*, 313 U.S. 387, 399 (1941). Even past threats of prosecution may not be sufficient to establish a controversy susceptible of resolution in federal court. *See, e.g., Ellis*, 421 U.S. 426. In short, potential litigants must show a threat of prosecution that is both real and immediate, *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969), before a federal court may examine the validity of a criminal statute.

Unlike defendants in *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), Dr. Goldner has not been convicted of any crime related to providing abortions, nor does the record reflect any basis for reasonably fearing such a conviction since there is no evidence in the record that he has ever treated a minor patient suffering from any health conditions that would necessitate an immediate abortion.

Perhaps more importantly, searching both the Westlaw and Lexis electronic databases, counsel for *amicus* has been unable to locate a *single* federal or state case after 1973 when *Roe v. Wade* was handed down, involving the prosecution of a physician merely for the violation of a parental involvement law. The only case that results from the search, SY(ABORTION! & CRIM! & PROSECU!) & PARENT! is *State v. Norflett*, 337 A.2d 609 (N.J. 1975), a case involving a non-physician, who performed an abortion on a seventeen-year-old who suffered severe injuries as a result. A similar search of the news databases for the same time period fails to reveal any news stories of trial court actions that might not be reflected in the appellate opinions comprising the state and federal cases databases.

The lower court opinions are based upon the implausible assumptions that Dr. Goldner might someday encounter a minor patient who (1) is not accompanied by a parent, (2) suffering from a condition that threatens her health to such a degree that (3) it is medically appropriate to forego notifying one of her parents, and (4) immediately proceed with an abortion, and that (5) Dr. Goldner could credibly

fear that a New Hampshire district attorney would prosecute him for failing to give notice to the minor's parent, notwithstanding the fact that (6) no such prosecution appears to have ever occurred elsewhere in the United States, and (7) both the minor and the parents of the minor would probably be adverse witnesses to the state in light of Dr. Goldner's life-saving actions. Such imaginary harm simply does not meet the common-sense standard required for article III standing.

C. ABORTION CLINICS DO NOT HAVE STANDING TO FACIALLY CHALLENGE STATUTES REGULATING THE PERFORMANCE OF ABORTIONS.

Standing is not automatically conferred upon a party by virtue of being an abortion clinic. This Court has consistently declined to determine whether abortion clinics have independent standing to challenge regulations related to the performance of abortions. *E.g., Doe v. Bolton*, 410 U.S. 173, 189 (1973) ("We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations."); *Danforth*, 428 U.S. 52, 62, n.2 (1976) ("We decline to consider here the standing of Planned Parenthood to attack § 7. That question appropriately may be left to the District Court for reconsideration on remand."); *Singleton v. Wulff*, 428 U.S. 106, 109 (1973); *Colautti v. Franklin*, 439 U.S. 379, 383 n.3 (1979); and *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 440 n.30 (1983). Only in the context of regulating the free speech of those who oppose abortion has this Court recognized the standing of abortion clinics, independent of claims by plaintiff-physicians. *See, e.g., Madsen v. Women's Health Cent.*, 512 U.S. 753, 757 (1994) (conflict between abortion protestors and clinic operators).

The complaint in this case does not allege any injury that would normally provide independent standing for

abortion clinics. The alleged harm suffered by the respondents is set forth in ¶ 32 of the Complaint:

> The Act deprives plaintiffs of due process of law as protected by the Fourteenth Amendment to the United States Constitution by (a) subjecting plaintiffs to criminal prosecution and civil liability for providing abortions to prevent the minor's death without clearly providing that they reasonably rely on their good faith medical judgment in certifying that such abortions are necessary to prevent the minor's imminent death; (b) containing vague and/or conflicting terms that fail to give plaintiffs adequate notice of what conduct the law prohibits; and (c) placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability.

The record does not contain any evidence of harm suffered by the clinics *qua* clinics, nor does this case involve a challenge to laws seeking to directly regulate the practices of abortion clinics. *Cf. Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health and Envtl. Control*, 317 F.3d 357, 362 (4th Cir. 2002), *cert. denied*, 538 U.S. 1008 (2003); and *Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004). The case does not involve a conflict regarding entry to the clinics.

The injuries complained of by the respondent-clinics are far too speculative to confer standing. Their fears of future prosecution are even more unrealistic than those of Dr. Goldner. There is no evidence in the record that any of the clinics have ever provided medical services to a minor experiencing any medical condition that necessitates an immediate abortion. More to the point, what little evidence the record does contain suggests that if clinics were to encounter such a minor, it is almost certain that the minor would certainly be accompanied by a parent. In ¶ 4 of Rachel Atkins' affidavit she states, "The vast majority of minors who obtain abortions from PPNNE [Planned Parenthood of Northern New England] in New Hampshire involve a parent in their decision." If the hypothetical minor suffering from the yet-to-be-determined medical conditions

appears, as Ms. Atkins' testified, in "the vast majority" of cases, she will be accompanied by a parent. This is the only evidence in the record regarding the experience of respondent-clinics. Thus based upon the record, any immediate abortion will be done with the knowledge of a parent, so the clinics will be in conformity with the law and under no threat of being the first defendants in the nation to be criminally prosecuted for violating a parental notice law. The lower courts erred in finding that the respondent-clinics had standing to pursue a facial challenge.

II. RESPONDENT ABORTION PROVIDERS LACK THIRD-PARTY STANDING TO ASSERT THE PRIVACY RIGHTS OF FUTURE MINOR PATIENTS.

As a general rule, a litigant lacks standing to assert the rights of others. *See United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (plurality opinion). Federal courts "must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (plurality opinion); *see also Barrows v. Jackson*, 346 U.S. 249, 255 (1953) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[A plaintiff] must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). Judicial review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (*quoting United States v. SCRAP*, 412 U.S. 669, 687 (1973)). Thus, a plaintiff bears a heavy burden when attempting to litigate the rights of others.

In those rare instances in which this Court has allowed such "third-party standing," the Court has imposed a three-part test: (1) "[t]he litigant must have suffered an 'injury in fact'"; (2) "the litigant must have a close relation to the

third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interest." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). All "three important criteria [must be] satisfied" for a litigant to possess third-party standing. *Id.* Abortion providers have failed to satisfy even one of these three requirements.

A. ABORTION PROVIDERS HAVE FAILED TO ESTABLISH THEY HAVE SUFFERED AN INJURY IN FACT.

Abortion providers in this case failed to present any evidence that they have ever provided an abortion to any minor suffering from any health condition that would necessitate an immediate abortion. This deficiency is not only fatal to their own standing, but also to their ability to assert claims on behalf of New Hampshire minors.

Singleton v. Wulff, 428 U.S. 106 (1976) (plurality opinion), is not to the contrary. In *Singleton* plaintiff-physicians' asserted both their own and their patients' rights to Medicaid reimbursement for abortions they performed in cases where the physicians had provided and anticipated continuing to provide abortions to low-income women. Four justices found third-party standing based upon the doctors' economic interests, while Justice Stevens found that the doctors' own constitutional rights were implicated. *Id.* at 121-22 (Stevens, J. concurring in part). Unlike the present case, not only did the doctors face the future loss of income, they were being denied payments owed to them for abortions already performed. *Id.* at 109; *id.* at 113. Present and future injury was simply not an issue as to the *Singleton* physician-plaintiffs.

Here, by contrast, the abortion providers seek relief from an injury they have not established even exists. Though respondents are abortion providers, they offered no evidence that they have ever provided an abortion to any woman suffering from any health condition that would necessitate an emergency abortion. Because the record does not show that respondents have, or have ever had, a relationship with any minors who would be denied immediate

abortions under New Hampshire's law, they have not suffered a cognizable injury. As Justice Rehnquist has observed, "[m]usings as to possible applications of a statute to third parties in hypothetical situations may be fitting for the classroom and the statehouse, but they are neither wise nor permissible in the courtroom." *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 976 (1984) (Rehnquist, J. dissenting). Any injury they claim is simply hypothetical. This fact alone makes third-party standing inappropriate here.

B. ABORTION PROVIDERS DO NOT HAVE THE CLOSE RELATIONSHIP WITH MINORS NEEDING IMMEDIATE ABORTIONS, WHICH IS REQUIRED FOR THEM TO REPRESENT THE MINORS' INTERESTS.

In *Singleton* Justice Blackmun, writing for the plurality emphasized the confidential relationship between physicians and their patients. 428 U.S. at 117. Observing that "a woman cannot safely secure an abortion without the aid of a physician" and relying upon the "closeness of the relationship," (*id.*) he opined that physicians are "uniquely qualified" to represent the interest of those who oppose abortion regulations. *Id.* Five justices, however, refused to join in this portion of the opinion.

Four dissenting justices expressed grave concern regarding the ability of the Court to subsequently "cabin" in this exception to the requirement that parties litigate only their own interests.

> The Court quite recently stated, with respect to the rule against assertion of third-party rights as well as certain other doctrines of judicial self-restraint, that "[t]hese principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. . . . Constitutional judgments . . . are justified only out of the necessity of adjudicating rights

> in particular cases between the litigants brought before the Court." *Broadrick v. Oklahoma*, 413 U.S., at 610-611, 93 S.Ct., at 2915 (citation omitted). Today's holding threatens to make just such "roving commissions" of the federal courts.

Id. at 130-131 (Powell, J. concurring in part, dissenting in part). Justice Powell has proven prophetic. Based on the Westlaw search "SY(ABORTION) & DATE AFT 1976" of all federal cases from 1976 until July 22, 2005, there have been more than 1,000 federal opinions dealing with abortion, a majority of which were not initiated by women seeking to vindicate their individual rights.

Most recently in *Kowalski v. Tesmer*, ___ U.S. ___, 125 S.Ct. 564 (2004) this Court found that, notwithstanding the confidential nature of the attorney-client relationship, plaintiff-attorneys did not have the requisite standing to assert a third-party claim to state-funded appellate counsel on behalf of indigent defendants who had pled guilty or *nolo contendere* because the lawyers had no existing relationship with any indigent defendants denied appellate counsel. *Id.* at 568.

The present case is more similar to *Kowalski* than *Singleton*. In *Singleton* the plaintiff-physicians had rendered services to their patients, and were denied payment for those services due to the law they challenged. 428 U.S. at 109. Correspondingly in *Doe v. Bolton* and *Danforth* the plaintiff-doctors challenged comprehensive regulatory schemes effecting their present relationships with patients seeking abortions. *See Doe v. Bolton*, 410 U.S. at 188; *Danforth*, 428 U.S. at 62. Here, there is only one plaintiff-physician challenging a limited portion of the New Hampshire parental notification law on behalf of future minor patients who, the lower courts inferred, theoretically might experience rare medical conditions. To paraphrase a holding of this Court, "[t]he abortion providers before the Court do not have a 'close relationship' with their alleged 'patients'; indeed, they have no relationship at all." *Cf. Kowalski v. Tesmer*, ___ U.S. ___, 125 S.Ct. 564, 568 (2004).

C. MINORS ARE CAPABLE OF ASSERTING THEIR OWN RIGHTS AND HAVE ROUTINELY DONE SO.

Before the abortion providers can assert the interests of their patients, "there must exist some hindrance to the third party's ability to protect his or her own interest." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). The four justices who accepted the physicians' claim to represent patients' interests when challenging abortion regulations in *Singleton* identified only two hindrances to patients asserting their own interests – a woman's desire to maintain her privacy regarding the decision to obtain an abortion, and the fact that litigation would be rendered moot by birth or termination of the pregnancy. 428 U.S. at 117-118. However, as the *Singleton* plurality notes, these are hardly insurmountable barriers to the assertion of constitutional rights. Women desiring to challenge abortion laws can proceed under a pseudonym, and the mootness doctrine has been sharply restricted in abortion cases since an unwanted pregnancy is "capable of repetition yet evading review." *Singleton*, 428 U.S. at 118, *quoting Roe v. Wade*, 410 U.S. 113, at 124-125 (1973). While one might suspect that minors are less able than adult women to protect their constitutional interests, the large number of federal cases in which pregnant minors have participated as plaintiffs clearly demonstrates the contrary.[2] *Cf. Powers v. Ohio*, 499 U.S. 400, 414

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[2] *See Hodgson v. Minnesota*, 497 U.S. 417, 430 (1990) (six pregnant minors), *H.L. v. Matheson*, 450 U.S. 398 (1981) (fifteen-year-old minor), *Bellotti v. Baird*, 443 U.S. 622, 626 (1979) ("Mary Moe," an unmarried pregnant minor); *Maher v. Roe*, 432 U.S. 464 (1977) (Mary Poe, a 16-year-old high school junior); *Coe v. Gerstein*, 376 F.Supp. 695 (S.D. Fla. 1974), *appeal dismissed for want of jurisdiction, cert. denied sub nom Gerstein v. Coe*, 417 U.S. 279 (1974), *aff'd, sub nom. Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd sub nom. Gerstein v. Coe*, 428 U.S. 901 (1976) ("Patricia Noe," a pregnant minor); *Akron Center for Reprod. Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988) (Patty Poe, an unmarried minor who believed she might be pregnant; and Rachel Roe, an unmarried minor who was refused an abortion due to the challenged statute), *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127 (7th Cir. 1983) (Sally Boe and Jane Doe, two pregnant minors); *Roe v. Casey*,

(Continued on following page)

(1991) ("As a practical matter, however, these challenges [by prospective jurors excluded due to race] are rare.")

In *Kowalski v. Tesmer*, ___ U.S. ___, 125 S.Ct. 564, 569 (2004), the ability of indigent defendants to appear *pro se* constituted an adequate safeguard of those defendants' rights, persuading a majority of this Court to deny standing to plaintiff-attorneys. Justice Rehnquist, writing for the majority observed, "While we agree that an attorney would be valuable to a criminal defendant challenging the constitutionality of the [state-funded criminal defense] scheme, we do not think that the lack of an attorney here is the type of hindrance necessary to allow another to assert the indigent defendants' rights." *Id.* Similarly, even if minors seeking to challenge various abortion regulations found it desirable to be represented by physicians in certain instances, such desirability does not translate into "the type

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464 F.Supp. 487 (E.D. Pa. 1978), *aff'd*, 623 F.2d 829 (3rd Cir. 1980) ("Plaintiff Moe," a pregnant thirteen-year-old minor); *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978) (Jane Doe and Sally Roe, two unmarried minors under the age of eighteen, pregnant at the time of the filing of the suit); *Noe v. True*, 507 F.2d 9 (6th Cir. 1974) ("Nancy Noe," a pregnant fourteen-year-old minor); *Foe v. Vanderhoof*, 389 F.Supp. 947 (D. Colo. 1975) (Fatima Foe, a pregnant unmarried sixteen year with a five-month old child); *H.B. v. Wilkinson*, 639 F.Supp. 952 (D. Utah 1986) (seventeen-year-old pregnant minor); *C.L.G. v. Webster*, 616 F.Supp. 1182 (W.D. Mo. 1985) (seventeen-year-old pregnant minor); *Margaret S. v. Treen*, 597 F.Supp. 636 (E.D. La. 1984) *aff'd sub nom Margaret S. v. Edward*, 794 F.2d 994 (5th Cir. 1986) ("Linda S," a seventeen-year-old pregnant minor); *T.L.J. v. Ashcroft*, 585 F.Supp. 712, (W.D. Mo. 1983) (a seventeen-year-old minor); *Lady Jane v. Maher*, 420 F.Supp. 318 (D. Conn. 1976) *aff'd by Maloney v. Lady Jane*, 431 U.S. 926 (1977) (pregnant minors whose legal guardians are the Connecticut Commissioner of Children and Youth Services); *Gary-Northwest Indiana Women's Services, Inc v. Bowen*, 421 F.Supp. 734 (N.D. Ind. 1976) *aff'd by Bowen v. Gary-Northwest Indiana Women's Services, Inc.*, 429 U.S. 1067 (1977) (sixteen-year-old pregnant unmarried minor); *Doe v. Scott*, 321 F.Supp. 1385 (N.D. Ill. 1971), *vacated and remanded sub nom., Hanrahan v. Doe*, 410 U.S. 950 (1973) ("plaintiff Poe is a high school girl who was pregnant"); and *Doe v. Exon*, 416 F.Supp. 716 (D. Neb. 1975) (a seventeen-year-old pregnant minor).

of hindrance necessary to allow physicians to assert New Hampshire minors' rights in this case."[3]

III. THE *SALERNO* STANDARD REFLECTS THE NEED TO AVOID BROAD ADVISORY OPINIONS AND RESPECT THE JUDGMENT OF THE LEGISLATIVE PROCESS.

In the present case, like many involving laws regulating abortion, respondents brought their facial challenge prior to the implementation of the New Hampshire law. Notwithstanding the narrow basis of the abortion providers' complaint, and the minute number of minors, if any, that the claimed deficiency would impact under the respondents' theory of the case, the lower courts ruled the entire New Hampshire parental notification act unconstitutional. Yet this Court has long counseled the application of two principles in constitutional adjudication:

> [A federal court] has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.

Liverpool, New York & Philadelphia S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885).

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[3] The ability of mature minors to utilize the judicial system to vindicate their rights is evidenced by the judicial bypass system established by this Court as a constitutional requirement of parental consent laws. *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 491-92 (1983).

A direct corollary to these principles is that one to whom application of a statute is constitutional may not attack the statute on the ground that the application of the statute to others may not be constitutional. *United States v. Raines,* 362 U.S. 17, 21 (1960). Another direct corollary is that a statute may be invalid as applied to one state of facts and yet valid as applied to another. *Poindexter v. Greenhow*, 114 U.S. 270, 304-05 (1885); *St. Louis, Iron Mountain & S. Ry. Co. v. Wynne*, 224 U.S. 354 (1912); *Kansas City S. Ry. Co. v. Anderson*, 233 U.S. 325 (1911).

In the context of facial challenges observation of these principles is of particular importance, for as this Court noted in its recent opinion of *Sabri v. United States*:

> Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of "premature interpretatio[n] of statutes" on the basis of factually bare-bones records.

541 U.S. 600, 124 S.Ct. 1941, 1948 (2004).

The *Salerno* rule recognizes the surreal aspect of facial challenges, particularly in the absence of any history of enforcement of the statute. Too often, as in this case, those who dissent from the political judgment of the people's representatives seek to use the courts to displace that judgment.[4] By requiring plaintiffs meet the *Salerno* standard in order to prevail in a facial challenge, this rule insures that courts, whose fact finding is limited to the parties before them, do not invalidate a statute that a

[4] Rachel Atkins, Vice President for Medical Services, Planned Parenthood of Northern New England, Betsy Schneider, Outreach Coordinator, Concord Feminist Health Center of Portsmouth, Brigit Ordway, Director of STD, HIV and Outreach Services, The Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. appeared before the New Hampshire Senate Judiciary Committee on May 13, 2003, and testified against HB 763-FN, the legislation that became the New Hampshire parental notification act before the Court in this case.

federal or state legislature has determined to be constitutional and sound public policy on the basis of a much broader understanding of the facts surrounding the issues dealt with the legislation. *Cf. City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 455 (1983) *overruled on other grounds*; *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Turner Broadcasting Sys. Inc. v. F.C.C.*, 520 U.S. 180, 199 (1997).

Rather than reaching "draconian" results precluding recognition of constitutional liberties, as suggested by some academics,[5] *Salerno* is merely a specific application of this Court's historic refusal to grant advisory opinions, *see Hayburn's Case*, 2 U.S. 408 (1792), since the essence of the plaintiffs' claim when asserting a facial challenge is a demand that the federal courts advise plaintiffs on the constitutionality of the challenged statute in all its possible applications. Even when the challenged law has constitutional applications, as the majority of statutes will, and the facial challenge fails, plaintiffs retain the ability to challenge the law when, and if, it is unconstitutionally applied to them. *See* Kevin Martin, Note, *Stranger in a Stranger Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 Colum. L. Rev. 173, 195 (1999).

The application of *Salerno* is particularly appropriate in cases where legislatures are accommodating competing constitutional interests. *Cf. McConnell v. Federal Election Com'n*, 540 U.S. 93, 137 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402-03 (2000) (Breyer, J. concurring) (deference to legislature appropriate when reviewing laws "where competing constitutional interests are implicated, such as privacy"). In the present case, the New Hampshire law reflects the legislature's reference to this Court's jurisprudence, in that the disputed provision mirrors the Minnesota law approved in *Hodgson v. Minnesota*, and the balancing of the liberty interest of those few minors who are mature and seek to obtain abortions free of parental

[5] *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 239-40 (1994).

influence or for whom parental involvement is not in their best interest, with the constitutional right and obligation of parents to direct the medical care of their minor daughters.

Without any doubt, application of the statute to the vast majority of New Hampshire minors is constitutional. *See Hodgson v. Minnesota*, 497 U.S. 417 (1990). The statute would have survived constitutional scrutiny had the lower courts applied the *Salerno* rule. Had the facial challenge been properly rejected in this case, the plaintiffs would still retain their ability to seek a determination regarding the constitutionality of the statute's application, should the need arise in the future.

IV. THE OVERBREADTH DOCTRINE APPLICABLE TO FIRST AMENDMENT CASES SHOULD NOT BE EXTENDED TO ABORTION CASES.

In *New York v. Ferber*, 458 U.S. 747 (1982) this Court articulated several principles regarding the "First Amendment overbreadth doctrine." *Id.* at 768. Key among these is the ideas that "overbreadth doctrine is 'strong medicine' and [courts] have employed it with hesitation, and then 'only as a last resort.'" *Id.* at 769. The doctrine is uniquely crafted for cases involving speech, which by its nature is a public activity, and a necessary precondition to maintaining a democratic republic. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957). Overbreadth doctrine reflects a sense that First Amendment rights, as indispensable elements for a functioning constitutional democracy, are the necessary conditions for the exercise of all other constitutional rights; stand on a different and higher footing from them; and require especially heightened judicial attention.

The asserted liberty interest of mature minors, or minors for whom parental consent is not in their best interest, to obtain secret abortions is plainly not of the same constitutional magnitude. This asserted liberty interest is premised upon the idea that abortion is an inherently

private decision to be made between the minor and her doctor. *See Danforth*, 428 U.S. at 75 (1976). The public dimension of this interest, to the extent that one exists, is found in the minor's relationship with her family:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures
>
> . . . .
>
> Whatever choice a pregnant young woman makes – to marry, to abort, to bear her child out of wedlock – the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational. Moreover, it is perfectly clear that the parental-consent requirement will necessarily involve a parent in the decisional process.

Id. at 101, 103 (Stevens, J., concurring in part, dissenting in part). The values of autonomy and isolation underlying the liberty interest of the minor differ significantly from the values of association and connectedness foundational to the constitutional right of free speech.

If a law diminishes free speech, it may effect the entire community in a way that is not true of a law that impacts the liberty interest of minors seeking to obtain abortions absent parental involvement. The silencing of political or social dialogue threatens the very capacity of communal self governance. For that reason, this Court has crafted a more generous standard of review for First Amendment facial challenges.

A law that affects the liberty interest of minors seeking to obtain abortions absent parental involvement is limited in the scope of individual lives it effects if it creates unconstitutional burdens. At most it will impact the minor, the father of the fetus, the fetus, and the immediate families of the minor and of the father of the fetus. Although the lives of these people are important, such a range of individuals who might experience the possible effects of unconstitutionality is no different from that of any other non-First

Amendment law that may be facially challenged, and yet is governed by the *Salerno* rule.

"The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions." *Matheson*, 450 U.S. at 412 (1981). To extend the overbreadth doctrine in this case would privilege the nontextual liberty interest of a minor to obtain an abortion without parental involvement over other constitutional rights – including both those that are explicitly set forth in the document's text, and those that are unenumerated. There is no foundation in Constitutional text, history or logic to treat a minor's interest in procuring an abortion without parental notice as a kind of constitutional superright. *Salerno* is the proper standard of review.

V. REQUIRING HEALTH EXCEPTIONS IN PARENTAL INVOLVEMENT LAWS THREATENS TO RENDER SUCH LAWS ILLUSORY.

The lower court found that New Hampshire was required to incorporate a health exception into its parental notification law. *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 59-62 (1st Cir. 2004). It reached this determination notwithstanding that the New Hampshire law was identical in pertinent part to the statute approved by this Court in *Hodgson v. Minnesota*, and respondents provided no evidence of having ever treated a minor experiencing any medical condition necessitating an immediate abortion.

A. REQUIRING A BROAD HEALTH EXCEPTION EFFECTIVELY RENDERS PARENTAL INVOLVEMENT LAWS VOID.

In arriving at its decision the lower court referred to this Court's discussion of the health exception in *Roe v. Wade*. *See Heed*, 390 F.3d at 58-59. In *Roe*, a broad definition of health was employed:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Roe v. Wade, 410 U.S. 113, 153 (1973). *See also Doe v. Bolton*, 410 U.S. 179, 192 (1973) (" . . . the medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health."). If, as the Court of Appeals below suggests, states were required to incorporate a similarly broad health exception to parental notification laws, any requirement that a parent be notified prior to the performance of an abortion on her minor daughter becomes a sham.

A simple example illustrates this point. As members of this Court have noted, minors routinely miscalculate the response of their parents when confronted with the news of their daughters' pregnancies. Justices O'Connor, Kennedy, and Souter have observed that parental consent and notification laws "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart." *Casey*, 505 U.S. at 895 (1992) (plurality). Justice Stevens has written:

> If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which

would in fact be loving, supportive, and, indeed for some, indispensable.

Danforth, 428 U.S. at 103-04 (Stevens, J., concurring in part, dissenting in part) (1976). When confronted with the fact that parents will learn of their pregnancies and intended abortions, it is quite natural that many minors will feel some emotional distress. If such ordinary feelings fall within the constitutional definition of a health risk, the number of minors who do not fall within the health exception may well approach zero, rendering the statutory duty of parental notification or consent nugatory.

B. PARENTAL INVOLVEMENT IS OF GREATER IMPORTANCE WHEN ABORTIONS ARE NECESSARY TO PRESERVE A MINOR'S HEALTH.

Even under the narrower definition of health approved by the plurality in *Casey*, there is little warrant for the lower court's ruling that the Constitution mandates secret access to abortion for all minors, regardless of maturity. This is especially true in light of the acknowledged medical benefits from parental involvement in a minor's decision to obtain an abortion.

In *Bellotti v. Baird*, this Court acknowledged the superior ability of parents to evaluate and select appropriate healthcare providers. 443 U.S. 622 at 641 (1979).

> In this case, however, we are concerned only with minors who, according to the record, range in age from children of twelve years to 17-year-old teenagers. Even the latter are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical.

Id.

Parental involvement laws also insure parents have the opportunity to provide additional medical history and information to abortion providers prior to performance of the abortion.

> An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

H.L. v. Matheson, 450 U.S. 398 at 411 (1981). Accord *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 518-19 (1990). This seems particularly important in cases where the abortion is a therapeutic response to a serious health condition.

The third way in which parental involvement improves the medical treatment of minors is by insuring that parents have adequate knowledge to recognize and respond to any post-abortion complication that may develop. *See Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502, 519 (1990). Some of the most serious post-abortion complications are delayed and may only be detected during the follow-up visit; yet, just one-third of all abortion patients actually keep their appointments for post-operative checkups. Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective, in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTIONS 20 (Maureen Paul et al., eds. 1999). In cases of immediate abortions due to serious health conditions, recovery will necessarily be impacted by the medical condition necessitating the abortion and require more careful monitoring.

Without knowledge of their daughters' abortions, parents cannot insure that their children obtain necessary post-operative care or provide an adequate medical history to physicians called upon to treat any complications that may arise. The first omission may allow complications such as infection, perforation, or depression to continue untreated. The second omission may be lethal. When parents do not know that their daughters have had abortions, ignorance may prevent swift and appropriate intervention

by emergency room professionals responding to life-threatening conditions.

VI. EVEN IF A *PER SE* RULE APPLIES, THE COURT SHOULD HAVE ENJOINED THE LAW ONLY AS TO MINORS IN NEED OF IMMEDIATE ABORTIONS.

Assuming *arguendo* that the lower courts properly attributed standing to the respondents, and that this Court is prepared to enforce a *per se* rule requiring inclusion of a health exception in parental notification laws, the lower courts failed to limit the remedy to reducing the overinclusiveness of the law. Since *Marbury v. Madison*, 5 U.S. 137 (1803) this Court has carefully limited its authority to provide the remedy sought by the plaintiffs, seeking to minimize its intrusion upon its other branches of government. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 at 473-74 (1982). Such careful discernment is missing from the lower court opinions in this case. Rather than enjoining enforcement only in the rare cases of minors suffering from medical conditions that necessitate immediate abortions, the lower courts enjoined the law in its entirety. Such intrusion into the political process is unwarranted by the precedent of this Court.

In determining whether to issue such a limited remedy, the question is whether it would be contrary to legislative intent. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985). The presence of a severability clause in the New Hampshire legislation at N.H. Rev. Stat. Ann. § 132.28 evidences the willingness of the legislature to have the Court alter the statutory scheme, where necessary to conform to constitutional pronouncements. *Cf. Casey*, 505 U.S. at 898 (invalidating only spousal notification provision of omnibus Pennsylvania abortion control act). By enjoining enforcement of the New Hampshire parental notification law in all instances, the lower courts disregarded their duty to tailor the relief to the scope of unconstitutional conduct.

VII. THE DISTRICT COURT ERRED IN FINDING THE "DEATH EXCEPTION" IS UNCONSTITUTIONALLY VAGUE AND VIOLATES THE RESPONDENTS' DUE PROCESS RIGHTS.

The lower courts erred in finding that the notification exception in the Act related to life-threatening circumstances must contain a scienter requirement in order to survive constitutional scrutiny. *Colautti v. Franklin*, 439 U.S. 379 (1979), cited by the District Court in support of its decision (*Heed*, 296 F.Supp. 2d at 66) specifically reserved the question whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible . . . " *Colautti* at 396. "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." *United States v. Ragen*, 314 U.S. 513, 523 (1942). Even *Casey* recognized that the "life or health of the mother" exception may be invoked only when necessary "in appropriate medical judgment." *Casey*, 505 U.S. at 879.

In *United States v. Vuitch*, 402 U.S. 62 (1971), this Court rejected claims very similar to those raised by respondents below. Dr. Vuitch had successfully challenged his indictment under a D.C. statute on the basis that the statute was unconstitutionally vague. The statute provided:

> Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years.

The government appealed, and the Court held that the phrase "necessary for the preservation of the mother's life or health," was not unconstitutionally vague. "Generally, doctors are encouraged by society's expectations, by

strictures of malpractice law and by their own professional standards to give patients such treatment as is necessary to preserve their health." *Id.* at 71. *See also Doe v. Bolton*, 410 U.S. 179 at 191-192 (1973) (upholding abortion statute against claim of vagueness in cases where abortion to be provided on the basis of physician's "best clinical judgment" that abortion is "necessary.").

This Court's precedent makes clear that the exception contained in N.H. Rev. Stat. Ann. § 132:26(I)(a) (2003) is not unconstitutionally vague, nor does it impermissibly burden plaintiff physician's due process rights.

CONCLUSION

The abortion providers in this case prevailed below on mere speculation. Disregarding the most relevant precedent of this Court in *Hodgson v. Minnesota*, these courts erroneously embraced a standard of review that disregards the superior fact-finding ability of the legislative branch and the traditional deference shown to legislative judgments on contentious social issues. For all the foregoing reasons, *amicus* respectfully urges the Court to vacate the judgments of the lower courts and remand to the district court with instructions to dismiss the case for want of standing, or in the alternative to reverse the judgments of the lower courts.

Respectfully submitted,

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In The Supreme Court of the United States

KELLY AYOTTE, Attorney General
of the State of New Hampshire,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* NEW HAMPSHIRE REPRESENTATIVE AND HB 763 SPONSOR KATHLEEN SOUZA, NEW HAMPSHIRE SENATORS JOHN S. BARNES, JR., ROBERT K. BOYCE, ROBERT J. LETOURNEAU, AND SHEILA ROBERGE, AND NEW HAMPSHIRE REPRESENTATIVES MICHAEL A. BALBONI, PETER BATULA, DAVID J. BETTENCOURT, DAVID L. BUHLMAN, HARRIET E. CADY, PAUL C. INGBRETSON, DANIEL C. ITSE, ROGERS J. JOHNSON, PHYLLIS M. KATSAKIORES, THOMAS J. LANGLAIS, ROBERT J. L'HEUREUX, PAUL MIRSKI, RICHARD W. MORRIS, SANDRA J. REEVES, AND ROBERT H. ROWE IN SUPPORT OF PETITIONER

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Anderson v. Edwards, 514 U.S. 143 (1995) 4

A Woman's Choice – East Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002) 21

Barnes v. Miss., 992 F.2d 1335 (5th Cir. 1993) 19

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Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000) 20

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Hodgson v. Minn., 497 U.S. 417 (1990) ..... *passim*

Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 6, 8

Jane L. v. Bangerter, 102 F.3d 1112 (10th Cir. 1996) 20

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Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992), *aff'd in part & rev'd in part on other grounds*, 61 F.3d 1493 (10th Cir. 1995) 22

Janklow v. Planned Parenthood, 517 U.S. 1174 (1996) 20

Kolender v. Lawson, 461 U.S. 352 (1983) 8

Liverpool, N.Y. & Philadelphia S.S. Co. v. Comm'r of Emigration, 113 U.S. 33 (1885) 7

Loeb v. Columbia Township Tr., 179 U.S. 472 (1900) 4

Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997) 20, 27

Marbury v. Madison, 5 U.S. 137 (1803) 4, 5

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 6, 12

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Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) 11

Planned Parenthood v. Casey, 505 U.S. 833 (1992) ....*passim*

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 9

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Planned Parenthood v. Lawall, 193 F.3d 1042 (9th Cir. 1999) 20

Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995) 20

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Planned Parenthood v. Owens, 287 F.3d 910 (10th Cir. 2002) 14

Planned Parenthood v. Wasden, 376 F.3d 908 (9th Cir. 2004) 21

Roe v. Wade, 410 U.S. 113 (1973) 11, 14, 17

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United States v. Salerno, 481 U.S. 739 (1987) ..... *passim*

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Younger v. Harris, 401 U.S. 37 (1971) 6

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OTHER AUTHORITIES

C.V. Anath et al., *The Association of Placenta Previa with History of Cesarean Delivery and Abortion: A Meta-analysis*, 177 AM. J. OBST. GYN. 1071 (1997) 24

P.Y. Ancel et al., *History of Induced Abortion as a Risk Factor for Preterm Birth in European Countries: Results of the EUROPOP Survey*, 19[3] HUMAN REPROD. 734 (Mar. 2004) 24

P.K. Coleman et al., *State-Funded Abortions Versus Deliveries: A Comparison of Outpatient Mental Health Claims Over Four Years*, 72[1] AM. J. ORTHOPSYCHIATRY 141 (Jan. 2002) 24

P.K. Coleman et al., *Substance Use Among Pregnant Women in the Context of Previous Reproductive Loss and Desire for Current Pregnancy*, 10[2] BRIT. J. HEALTH PSYCHOLOGY 255 (May 2005) 25

A. Conde-Agudelo et al., *Effect of the Interpregnancy Interval after an Abortion on Maternal and Perinatal Health in Latin America*, 89 INT'L J. GYN. OBST. S34 (Supp. Apr. 2005) 24

Jesse Cougle et al., *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, 9[4] MED. SCI. MONITOR CR157 (2003) 24

J.R. Daling et al., *Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion*, 86[21] J. NAT'L CANCER INST. 1584 (Nov. 2, 1994) 25

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Michael C. Dorf, *Facial Challenges to State & Federal Statutes*, 46 STAN. L. REV. 235 (1994) 8

M. Gissler et al., *Suicides After Pregnancy in Finland, 1987-1994: Register Linkage Study*, 313[7070] BRIT. MED. J. 1431 (Dec. 7, 1996) 25

J. Gold & W. Cates, Jr., *Restriction of Federal Funds for Abortion: 18 Months Later*, 69 AM. J. PUB. HEALTH 929 (1979) 22

M.S. Hendricks et al., *Previous Cesarean Section and Abortion as Risk Factors for Developing Placenta Previa*, 25[2] J. OBST. GYN. RES. 137 (Apr. 1999) 24

Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173 (1999) 8

C. Moreau et al., *Previous Induced Abortions and the Risk of Very Preterm Delivery: Results of the EPIPAGE Study*, 112[4] BRIT. J. OBST. GYN. 430 (Apr. 2005) 24

D.B. Petitti & W. Cates, Jr., *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age*, 67 AM. J. PUB. HEALTH 860 (1977) 22

James Rogers et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 AM. J. PUB. HEALTH 294 (1991) 19

Brent Rooney & Byron C. Calhoun, *Induced Abortion and Risk of Later Premature Births*, 8[2] J. AM. PHYSICIANS & SURGEONS 46 (Summer 2003) 24

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V.M. Taylor et al., *Placenta Previa in Relation to Induced and Spontaneous Abortion: A Population-Based Study*, 82 OBST. & GYN. 88 (1993) 24

John M. Thorp et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58[1] OBST. GYN. SURVEY 67 (Jan. 2003) 24, 25

INTEREST OF AMICI CURIAE[1]

Amici, as New Hampshire Senators and Representatives, have a unique interest in the outcome of this case. On June 19, 2003, the Governor of New Hampshire signed into law House Bill 763 (HB 763), the parental notice statute before this Court. *Amicus* Representative Kathleen Souza was a sponsor of HB 763 and, as such, maintains a special interest in the constitutionality of the statute. It was her intent, as well as the intent of her co-sponsors, to protect minors against their own immaturity, to foster the family structure and preserve it as a social unit, and to protect the rights of parents to rear their children.

Amici Senators John S. Barnes, Jr., Robert K. Boyce, and Sheila Roberge, along with Representatives Michael A. Balboni, Peter Batula, David L. Buhlman, Harriet E. Cady, Paul C. Ingbretson, Daniel C. Itse, Rogers J. Johnson, Phyllis M. Katsakiores, Robert J. L'Heureux, Richard W. Morris, Sandra J. Reeves, and Robert H. Rowe each voted in favor of the bill. These Senators and Representatives, along with the nine Senators and 185 Representatives that voted along with them, agreed that the State has compelling interests in protecting minors and families.[2] *Amici* Senator Robert Letourneau and Representatives David J. Bettencourt, Thomas J. Langlais, and Paul

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[1] This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part. No entities other than the *Amici* or their counsel have made a monetary contribution to the preparation or submission of this Brief.

[2] *See* Appendix at App. 1 for the New Hampshire Legislature's findings of fact.

Mirski were elected after HB 763 passed, but each affirms the Legislature's intent in passing the bill.

Due to the confusion among the courts across the country and the First Circuit's use of strict scrutiny in striking down New Hampshire's parental notification statute, *Amici* are left with nothing to guide them except speculation in enacting statutes concerning abortion. Consequently, *Amici* file this brief on behalf of Petitioner, urging this Court to reverse the judgment of the lower court.

SUMMARY OF ARGUMENT

Twenty-four years after this Court first upheld a parental notice statute and rejected an as-applied challenge in *H.L. v. Matheson*, 450 U.S. 398 (1981), the Court is once again faced with an overreaching federal court decision striking down a substantially similar parental notice law. Central to this Court's decision is the proper standard of review to apply in the facial challenge to the parental notice statute. In a long line of cases prior to *United States v. Salerno*, 481 U.S. 739 (1987), this Court defined a statute as facially invalid only if it was "invalid in all its applications."

This Court has repeatedly emphasized that the States possess compelling interests in the protection of minors and maternal health. Yet despite the Court's repeated recognition of such interests, it and the courts below have applied an analysis tantamount to strict scrutiny in repeatedly striking down reasonable, common sense laws that attempted to protect those interests. The First Circuit's complete failure to consider New Hampshire's

interests in the parental notice law demonstrates the courts' utilization of the strictest scrutiny in analyzing such laws.

Furthermore, the standard set forth in *Planned Parenthood v. Casey* – that an abortion provision is unconstitutional if, "in a large fraction of the cases [the provision] will operate as a substantial obstacle" to abortion – has sown considerable confusion among the lower courts and state legislatures. 505 U.S. 833, 895 (1992). Due to the speculative nature of the *Casey* "large fraction" standard, plaintiffs are encouraged to rely on speculation, and federal judges and state lawmakers are left to simply guess at the constitutionality of a regulation.

Finally, the substantial health risks to minors render it unjustifiable to exempt state parental notice laws from the traditional facial challenge standard. In this context, the overbreadth doctrine would undermine thorough review of such facial challenges and would eviscerate the States' compelling interests.

Because the traditional facial challenge standard is consistent with prior case law and is necessary to protect the compelling interests that this Court has itself identified, the Court should reaffirm the traditional facial challenge standard. As the New Hampshire law is not invalid in all its applications, the Court should reverse the lower court's decision.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM THE TRADITIONAL FACIAL CHALLENGE STANDARD FOR PARENTAL NOTICE LAWS BECAUSE IT IS CONSISTENT WITH PRIOR CASE LAW AND IS NECESSARY TO PROTECT THE STATES' RECOGNIZED COMPELLING INTERESTS.

A. Before *Salerno*, the Court traditionally held that a facial challenge could not succeed unless the statute was "invalid in all its applications."

In *United States v. Salerno*, the Court articulated the following standard of review for facial challenges:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Salerno, 481 U.S. 739, 745 (1987).[3] This Court and its Justices have used the following various terms to refer to a facially invalid statute: "void," "void on its face," "invalid *in toto*," or, as in *Marbury v. Madison*, "repugnant to the Constitution."[4] In other words, a facial challenge attacks a

[3] A unanimous Supreme Court relied on *Salerno* in *Anderson v. Edwards*. 514 U.S. 143, 155 n.6 (1995).

[4] *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 495 n.5 (1985); *Missouri Rate Cases*, 230 U.S. 474, 508-09 (1913); *Loeb v.*

(Continued on following page)

statute "*in toto*" and makes it utterly inoperative, necessarily implying that there can be no constitutional application.

Prior to *Salerno*, the phrase commonly used by this Court in explaining this standard was "invalid in all its applications." For example, in *Brockett v. Spokane Arcades, Inc.*, the Court stated, "we are unconvinced that the identified overbreadth is incurable and would taint ***all possible applications*** of the statute. . . ." *Brockett*, 472 U.S. at 504 (emphasis added). The court concluded that there was "no satisfactory ground for striking the statute down in its entirety because of ***invalidity in all of its applications***." *Id.* at 505 (emphasis added).

In *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, the Court pervasively used the "in all its applications" language. 467 U.S. 947 (1984). The Court concluded that the flaw in the statute was not that it included some impermissible applications, but that "***in all its applications***" it operated on a fundamentally mistaken premise. *Id.* at 966 (emphasis added). The Court also noted that the doctrine of "overbreadth" has been used to describe "a challenge to a statute that ***in all its applications*** directly restrict[s] protected First Amendment activity."[5] *Id.* at 966 n.13 (emphasis added).

Columbia Township Tr., 179 U.S. 472, 477-80, 490-92 (1900); *Marbury v. Madison*, 5 U.S. 137, 177, 180 (1803).

[5] The Court stated that facial challenges have been upheld in contexts other than the First Amendment and that, whether a challenge is labeled "overbreadth" or simply a "facial challenge," "the point is that there is no reason to limit challenges to case-by-case 'as applied' challenges when the statute ***on its face and therefore in all its***

(Continued on following page)

That same year, the Court stated in *Members of City Council v. Taxpayers for Vincent* that there are two ways in which a statute may be considered facially invalid: "either because it is unconstitutional ***in every conceivable application***, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (emphasis added). The Court added that "a holding of facial invalidity expresses the conclusion that the statute could ***never be applied in a valid manner***." *Id.* at 797 (emphasis added). The Court also stated that its decisions have repeatedly employed facial invalidation where "***every application*** of the statute created an impermissible risk of suppression of ideas." *Id.* at 798 n.15 (emphasis added).

Likewise, in *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, the Court noted that a facial challenge in the context of overbreadth and vagueness meant that a statute was "***incapable of any valid application***." 455 U.S. 489, 494 n.5 (1982). Thus, to succeed, the complainant must demonstrate that a statute is impermissibly vague ***in all of its applications***. *Id.* at 497.[6]

This "invalid in all its applications" standard is consistent with at least six corollary rules of constitutional law. First, no federal court has "jurisdiction to pronounce

applications falls short of constitutional demands." *Munson*, 467 U.S. at 966 n.13 (emphasis added).

[6] These cases, along with the *Salerno* standard, must be read against the backdrop of the Court's 1971 decision in *Younger v. Harris* regarding facial challenges on First Amendment grounds, where Justice Black acknowledged extreme hesitation in entertaining facial challenges on *any* grounds. *See Younger*, 401 U.S. 37, 52-53 (1971).

any statute . . . void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *United States v. Raines*, 362 U.S. 17, 21 (1960) (quoting *Liverpool, N.Y. & Philadelphia S.S. Co. v. Comm'r of Emigration*, 113 U.S. 33, 39 (1885)). Second, federal courts should never "anticipate a question of constitutional law in advance of the necessity of deciding it." *Brockett*, 472 U.S. at 501 (quoting *Raines*, 362 U.S. at 21). Third, a federal court should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.*

Fourth, it is an "elementary principle" that a statute may be constitutional in part and unconstitutional in part and, if the constitutional part is independent of the unconstitutional part, the constitutional part may stand, while only the unconstitutional part is rejected. *Id.* at 502. Fifth, the "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."[7] *Raines*, 362 U.S. at 21. This Court has developed various reasons for this rule, including the fact that it is undesirable to consider every conceivable situation which might arise in applying complex and comprehensive legislation. *Id.*[8] Finally, in evaluating a

[7] The exception to this rule is First Amendment overbreadth. *See Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 634 (1980).

[8] *See also Munson*, 467 U.S. at 955 (stating that the rule frees the Court from unnecessary pronouncements on constitutional issues as well as from premature interpretations of statutes) (quoting *Raines*, 362 U.S. at 22).

facial challenge, a court must consider any limiting construction proffered by a state court or enforcement agency. *Kolender v. Lawson*, 461 U.S. 352, 355 (1983) (quoting *Flipside*, 455 U.S. at 494 n.5). This rule is necessary because the limiting construction may allow at least one valid application. Each of these corollary rules of constitutional law reinforces the use of the "invalid in all its applications" standard [hereinafter "traditional facial challenge standard"].[9]

This Court has previously applied the traditional facial challenge standard in upholding abortion regulations against facial challenges. *See Planned Parenthood v. Casey*, 505 U.S. 833, 885-87 (1992) (upholding Pennsylvania's 24-hour waiting period, despite its effect on "some women"); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (applying *Salerno*); *Ohio v. Akron Ctr. for Reprod. Health* (*Akron II*), 497 U.S. 502, 514 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'") (quoting *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring)); *Webster*, 492 U.S. at 524 (O'Connor, J., concurring) (quoting *Salerno*). *See also Hodgson v. Minn.*, 497 U.S. 417, 444-45 (1990) (stating that a statute requiring a minor to wait 48 hours after notifying a parent of her intent to get an abortion would reasonably further a legitimate state interest). This Court should do so in this case as well.

[9] These six corollary rules, along with the long line of cases applying the "invalid in all its applications" standard, refute the notion that individuals, in the abstract, have a "right to be judged by a constitutionally valid rule of law." *See* Michael C. Dorf, *Facial Challenges to State & Federal Statutes*, 46 STAN. L. REV. 235, 242 (1994). Even if one concedes that the Constitution "permits only the application of constitutional rules," it begs the question: application to whom and in what circumstances? *See* Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173 (1999) (providing a point by point response to the Dorf article).

B. The traditional facial challenge standard is necessary to protect important and legitimate state interests that this Court has repeatedly recognized.

For 32 years, this Court and its individual Justices have repeatedly stated that the States have important, even "compelling," interests in the protection of minors and the regulation of abortion. In fact, the Court has unanimously agreed that "there is a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of Ca., Inc. v. FCC*, 492 U.S. 115, 126 (1989). *See also United States v. Am. Library Ass'n*, 539 U.S. 194, 218 (2003) (Breyer, J., concurring) (recognizing that protecting minors from harm is a legitimate and often compelling interest).

In *H.L. v. Matheson*, the Court concluded that a Utah parental notification statute "serve[d] important state interests." *Matheson*, 450 U.S. 398, 413 (1981). The Court also stated that the inhibition of *some* minors from seeking abortions was not a valid basis to void the statute. *Id.* Justice Stevens noted that Utah's interest in the welfare of its young citizens was "*fundamental* and *substantial*" and "justifie[d] a variety of protective measures." *Id.* at 421 (Stevens, J., concurring) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 102-03 (1976)) (emphasis added). Additionally, in an opinion authored by Justice Kennedy, the Court in *Akron II* recognized that a State may require a physician himself to take reasonable steps to notify a minor's parent, as a parent will often provide important

medical data and better advice to a minor. *Akron II*, 497 U.S. at 518-19 (citing *Matheson*, 450 U.S. at 411).

Justice O'Connor recognized that States have *compelling* interests in the areas of health and maternal safety and that these interests are present *throughout pregnancy*. *Akron v. Akron Ctr. for Reprod. Health* (*Akron I*), 462 U.S. 416, 459-60 (1983) (O'Connor, J., dissenting); *see also Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting) (quoting her dissent in *Akron I*). Justice O'Connor also explained that the standard of strict scrutiny is not to be applied unless there is an undue burden on the pregnant mother – and that such burdens are only present in situations "involving *absolute* obstacles or *severe* limitations on the abortion decision." *Akron I*, 462 U.S. at 462-64 (O'Connor, J., dissenting) (emphasis added); *see also Thornburgh*, 476 U.S. at 828-29 (O'Connor, J., dissenting).

Furthermore, the plurality in *Casey* affirmed the States' substantial interest in informing a woman of the health risks of abortion. *Casey*, 505 U.S. at 882-83. In fact, the Court concluded that such interests carry particular force regarding minors. *Id.* at 899 (citing *Hodgson*, 497 U.S. at 448-49 (stating that a brief waiting period provides parents with the opportunity to consult family physicians, to inquire into the competency of a doctor, to discuss the religious or moral implications of abortion, and to provide guidance in evaluating the future impact of the abortion decision)).

In addition, the Court has repeatedly acknowledged the special immaturity of minors in making the abortion decision. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (stating that there were three reasons why the constitutional rights of children cannot be equated with

those of adults: the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing). *See also id.* at 635 ("[M]inors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.").[10] Indeed, there is a compelling need to protect minors from their lack of judgment in choosing abortion providers.

The plurality in *Casey* concluded that these State interests had "been given too little acknowledgment and implementation by the Court" in the cases following *Roe v. Wade*. *Casey*, 505 U.S. at 871 (citing *Roe v. Wade*, 410 U.S. 113, 162-63 (1973)). Both this Court's prior use of the traditional facial challenge standard as well as its continued support of States' compelling interests justify use of the traditional facial challenge standard in the situation at hand.

C. The New Hampshire parental notice statute is not invalid in all of its applications.

The New Hampshire parental notice statute is not invalid in all of its applications for several reasons. First, abortion is not a fundamental right, and as such the interest in preventing the chilling of speech in the First Amendment overbreadth context is not justified in this

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[10] Justice O'Connor also recognized the substantial interest in the health and welfare of minors. *See Akron I*, 462 U.S. at 453-54, 454 n.1, 459-60 (O'Connor, J., dissenting); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in part and dissenting in part).

context.[11] The Court has never referred to abortion as a fundamental right since it decided *Akron I*.[12] In addition, the plurality in *Casey* specifically refuted the use of strict scrutiny analysis in the abortion context. *See Casey*, 505 U.S. at 870-71.

Second, no vagueness challenge is present here that might justify an exception to the traditional facial challenge standard. *See generally Colautti v. Franklin*, 439 U.S. 379 (1979). Just the opposite is true; the medical emergency exception in the New Hampshire statute is challenged as *unconstitutionally narrow*. Third, this Court has not previously demanded the *Doe* "health" exception for any *regulation*, but only for a *prohibition* of abortion. *See, e.g., Carhart*, 530 U.S. at 948 (O'Connor, J., concurring) ("[A] postviability *proscription* of abortion would be invalid absent a health exception. . . . ") (emphasis added).

Fourth, New Hampshire was entitled to rely on the "medical emergency" exception in the Minnesota parental notice statute that this Court upheld in *Hodgson v. Minnesota*. *See generally Hodgson*, 497 U.S. 417. That statute provided that notice was not required if "[t]he attending

[11] *See* Part IV, *infra*. Regardless, New Hampshire's statute is constitutional even under the overbreadth prong mentioned by this Court in *Taxpayers for Vincent*, as the statute is not *substantially* overbroad. *See Taxpayers for Vincent*, 466 U.S. at 796 (stating that a statute may be considered facially invalid if it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally "overbroad"); *see also infra* n.31 & accompanying text.

[12] The Court never referred to abortion as a fundamental right in *Stenberg v. Carhart*. Moreover, *Carhart* dealt with a narrow circumstance – a direct *prohibition* of an abortion procedure – and not a *regulation* of that procedure. *See generally Stenberg v. Carhart*, 530 U.S. 914 (2000).

physician certifies . . . that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice." *Id.* at 426 n.7; *see also* Appendix at App. 7. The Respondents present no evidence that the Minnesota medical emergency exception has had any negative impact that would be solved by an immediate abortion in an abortion clinic.

The narrowness of the New Hampshire medical emergency exception is needed for several reasons.[13] The definition acts as a loophole to avoid parental notice; the precision or breadth of the definition defines the size of that loophole. In addition, the *Doe* definition of "health" is unacceptably broad and would act to destroy the requirement of parental notice. Furthermore, the greater the medical emergency – short of a truly life-threatening emergency – the greater the need for parental notice, because it is the custodial parent who will take care of the minor and be informed about her condition. Finally, none of the conditions outlined in the affidavit filed by the abortion provider in this case warrants an immediate abortion as the proper medical response. Abortion clinics are not equipped to deal with such urgent conditions, and any minor would be properly advised to go to an emergency room and not an abortion clinic.

For these reasons, Respondents cannot demonstrate that the New Hampshire statute is invalid in all its applications. In fact, Respondents cannot demonstrate that the statute is invalid in *any* application.

[13] As Justice Kennedy observed in *Carhart*, "[a] ban which depends on the 'appropriate medical judgment' of Dr. Carhart is no ban at all. . . . This, of course, is the vice of a health exception resting in the physician's discretion." *Carhart*, 530 U.S. at 972 (Kennedy, J., dissenting).

II. THE COURTS' APPLICATION OF THE *CASEY* "LARGE FRACTION" STANDARD IS TANTAMOUNT TO THE STRICT SCRUTINY THIS COURT REPUDIATED IN *CASEY*

Despite this Court's repeated recognition of States' interests in the protection of minors and maternal health, it and the courts below have repeatedly struck down reasonable, common sense laws that attempted to protect those interests. Indeed, it was the federal courts' drastic use of strict scrutiny in abortion regulation cases that the *Casey* plurality found problematic, leading to the overturning of *Akron I* and *Thornburgh*. *See Casey*, 505 U.S. at 870 ("[W]e must overrule those parts of *Thornburgh* and *Akron I* which . . . are inconsistent with *Roe's* statement that the State has a legitimate interest. . . ."). The plurality upheld *Roe's* "essential holding" that a State has "legitimate interests from the outset of the pregnancy in protecting the health of the woman. . . ." *Id.* at 846. The plurality held that the States' interests had been given too little acknowledgment and implementation by the Court and concluded that not all of the post-*Roe* cases could be reconciled with the holding in *Roe* that a State has legitimate interests. *Id.* at 871.

Unfortunately, in the wake of *Casey* and *Carhart*, the federal courts are again reviewing abortion regulations under a standard tantamount to strict scrutiny. In fact, the courts do not even take the States' interests – compelling or not – into consideration at all. In essence, the federal courts[14] – including this Court[15] – have returned to

[14] *See, e.g., Planned Parenthood v. Owens*, 287 F.3d 910, 918 (10th Cir. 2002) (stating that the "undue burden" standard did not apply to the question of whether a health exception is required in an abortion

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the strict scrutiny standard urged in Justice Blackmun's dissent in *Casey*. *Casey*, 505 U.S. at 934 (Blackmun, J., concurring in part and dissenting in part) ("Application of the strict scrutiny standard results in the invalidation of all the challenged provisions.").

The First Circuit is guilty of the same. In evaluating New Hampshire's parental notification statute, the First Circuit solely considered the "large fraction-relevant group-substantial obstacle" standard used in one portion of the *Casey* opinion [hereinafter "*Casey* 'large fraction' standard"]. *Planned Parenthood v. Heed*, 390 F.3d 53, 57-58 (1st Cir. 2004); *see also Casey*, 505 U.S. at 895 ("[I]n a large fraction of the cases in which [the particular provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."). In doing so, the First Circuit struck down as unconstitutional a parental notice statute which, ironically, is substantially identical to the statute this Court upheld in *Hodgson*. *See Hodgson*, 497 U.S. at 423-27 nn.1-9; *see also* Appendix at App. 6-9.[16]

statute and concluding that "the current state of the law is that state abortion regulations must provide an exception for the protection of the health of pregnant women. . . .").

[15] In *Carhart*, Justice Kennedy maintained that the Court was turning back to post-*Roe* and pre-*Casey* standards by applying the strict scrutiny standard that *Casey* rejected. *See Carhart*, 530 U.S. at 968-69 (Kennedy, J., dissenting).

[16] Also ironic is the fact that the plurality in *Casey upheld* the parental consent statute at issue in that case – and did not apply the "large fraction" standard in doing so. *Casey*, 505 U.S. at 899. *Casey* involved a parental *consent* statute, while *Hodgson* involved a parental *notification* statute – and the Court in *Casey* never questioned the result in *Hodgson*.

The First Circuit did not in any way consider the State's interests in its analysis of New Hampshire's parental notification statute.[17] The court concluded that "a statute regulating abortion must contain a health exception in order to survive constitutional challenge" – without *any* consideration of the State's interests. *Heed*, 390 F.3d at 59. After noting that this Court in *Carhart* could not "see how the interest-related differences could make any difference to the . . . application of the 'health' requirement," the First Circuit concluded the following:

> Thus, ***regardless of the interests*** served by New Hampshire's parental notice statute, it does not escape the Constitution's requirement of a health exception.

Id. at 59-60 (citing *Carhart*, 530 U.S. at 931) (emphasis added).[18] However, even strict scrutiny analysis considers the States' compelling interests and does not automatically render a statute unconstitutional. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (stating that the very purpose of strict scrutiny is to take relevant differences into account).

Yet the First Circuit apparently assumed that, contrary to this Court's plain language in previous cases reviewing parental consent and notification statutes, *any*

[17] New Hampshire's interests were outlined in the Legislature's findings of fact in HB 763. *See* Appendix at App. 1. This Court has also repeatedly enumerated such interests in previous abortion decisions. *See* Part I.B., *supra*.

[18] *But see Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting) ("I dispute not only the wisdom but also the legitimacy of the Court's attempt to discredit and preempt state abortion regulation *regardless* of the interests it serves and the impact it has.") (emphasis added).

influence on a minor's decision and ability to obtain an abortion is necessarily undue, even if such influences are not "absolute" or "severely limiting."[19] The First Circuit did not consider the State's interests and weigh them as less than a minor's in reaching its ruling – it simply left the State's interests at the wayside, because "*regardless*" of what the State could show the court, the court was going to rule against it. This newly-modified facial challenge standard completely eviscerates the compelling interests every State has in maternal health and the protection of minors. This is the utter essence of the strict scrutiny analysis the plurality in *Casey* repudiated.

III. THE *CASEY* "LARGE FRACTION" STANDARD HAS SOWN CONSIDERABLE CONFUSION AMONG COURTS AND STATE LAWMAKERS

Rather than clearing up the courts' decisions that went "too far" in the wake of *Roe*, *Casey* has simply proven to confuse federal judges as they attempt to apply the "large fraction" standard the plurality utilized in voiding Pennsylvania's spousal notice statute. *See Casey*, 505 U.S. at 895. While the Court had previously applied the *Salerno* "no set of circumstances" standard to abortion regulations in *Webster*, *Akron II*, *Hodgson*, and *Rust*, the plurality in *Casey* applied the *Salerno* standard to some of the Pennsylvania provisions, such as the parental consent regulation, and created the new "large fraction" facial challenge for the spousal notice regulation. Moreover, the plurality did so without overruling or even addressing the future

[19] *See Akron I*, 462 U.S. at 462-64 (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 828-29 (O'Connor, J., dissenting).

applicability of *Salerno*. If this Court cannot apply either the *Casey* standard or the traditional facial challenge standard evenly, it is hard to conceive how the lower courts can do so.

This rule – that an abortion provision is unconstitutional if, "in a large fraction of cases [the provision] will operate as a substantial obstacle to a woman's choice to undergo an abortion" – is not capable of general or consistent application by judges or state lawmakers. The three material terms in this new standard – "large fraction," "relevant," and "substantial" – are subjective and ambiguous terms, and even more so in the context of a facial challenge where a court can only guess at the impact of the law.

In utilizing the *Casey* "large fraction" standard, a court must first decide in what situations a law is "relevant." This results in the kind of "worst-case analysis" which the Court had previously declared should be avoided in facial challenges. *Akron II*, 497 U.S. at 514 ("The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur."). In situations concerning parental notice statutes, courts typically include in the relevant group only those minors who do not want to inform their parents. Yet this is a tiny fraction of all minor females in any particular state.[20]

[20] The courts should consider the positive impact of a parental notice law on all minor females, as all minor females are put on notice that if they engage in sex and become pregnant, they cannot obtain abortions without first notifying their parents. Between 1981 and 1986, when the Minnesota parental notice law was in effect, *both* adolescent abortion rates *and* adolescent pregnancy rates fell significantly. *See*

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Second, a court must identify the "large fraction" of this relevant group. Is ten percent a large enough fraction of the relevant group? Or 20 or 30 percent? The plurality in *Casey* gives no instruction as to this question. Finally, a court must speculate as to whether a provision will impose a "substantial obstacle" on this large fraction of the relevant group. Is "substantial" determined by expense, time, or both? May a court simply examine the face of the statute itself, or is it required to assess other factors over which a State legislature has no control, such as political, demographic, geographic, and economic factors, and whether these factors create a substantial obstacle to the effectuation of a woman's abortion decision?

The alleged abandonment of the traditional facial challenge rule and the *Casey* plurality's selective use of the "large fraction" standard has forced the states to counter a morass of speculative claims about what a law might conceivably do if enforced. As one Fifth Circuit decision aptly noted after *Casey*, "[d]espite the recent efforts of a three-justice plurality of the Supreme Court, passing on the constitutionality of state statutes regulating abortion after *Casey* has become neither less difficult nor more closely anchored to the Constitution." *Barnes v. Miss.*, 992 F.2d 1335, 1337 (5th Cir. 1993). Indeed, just four years after *Casey*, the Court itself once again sharply divided

James Rogers et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 AM. J. PUB. HEALTH 294 (1991). This evidence demonstrates that the parental notice law impacted the *entire* group of adolescent females.

over the standard of review in *Janklow v. Planned Parenthood*.[21]

Examples of the confusion created in the wake of *Casey* are ample.[22] In 2002, the Seventh Circuit stated the following:

> When the Justices themselves disregard rather than overrule a decision – as the majority did in *Stenburg*, and the plurality did in *Casey* – they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves

[21] *See generally Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996). In his concurrence in *Janklow*, Justice Stevens claimed that the "no set of circumstances" standard was unsupported by precedent and that *Salerno's* "dictum" has been properly ignored in subsequent cases. *Janklow*, 517 U.S. at 1175-76 (Stevens, J., concurring). However, Justice Stevens also declared that in that particular circumstance there was "no need . . . to affirmatively disavow" the language in *Salerno*. *Id.* Noting that the Court has sent mixed signals to the lower courts on the question of *Salerno's* applicability, Justice Scalia stated that *Salerno* has *not* been *consistently* ignored by the Court. *Id.* at 1178, 1178 n.3 (Scalia, J., dissenting).

[22] *See, e.g., Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 164-65 (4th Cir. 2000) (noting "considerable debate among the circuits"); *Planned Parenthood v. Lawall*, 193 F.3d 1042, 1046 (9th Cir. 1999) (O'Scannlain, J., dissenting) (noting the tension between the pre-*Casey* cases and the "mysterious and unexplained deviation" from *Salerno* in *Casey*); *Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997) (stating that the circuits are divided in the application of *Salerno*). *See also Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (noting that the standard applicable to previability abortion regulations after *Casey* is a matter of some dispute); *Planned Parenthood v. Miller*, 63 F.3d 1452, 1457 (8th Cir. 1995) (stating that the circuits are split regarding whether the Supreme Court has overruled *Salerno* for abortion cases).

> an inferior court of the duty to follow decisions on the books.

A Woman's Choice – East Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003).

The Fifth Circuit has noted, "[a]s far as we can tell, the Court appears to be divided 3-3 on the *Salerno-Casey debate*, and it would be ill-advised for us to *assume* that the Court will abandon *Salerno* because three members of the Court now desire that result." *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1104 (5th Cir. 1997) (emphasis in the original). As of 2004, the confusion still existed. The Ninth Circuit recognized this confusion and noted that the "large fraction" standard has been labeled "unique." *Planned Parenthood v. Wasden*, 376 F.3d 908, 920 n.9 (9th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 2791 (March 28, 2005). The Fourth and Fifth Circuits have adhered to the *Salerno* standard, while the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have adopted the "large fraction" standard.

Added to the courts' confusion is the fact that facial challenges are inherently speculative. It is impossible in a facial challenge for a court to *find* that a statute *causes* an "undue burden," as the statute has never gone into effect or been enforced in real situations. By the very nature of the analysis, a court can only guess the possible or likely impact. This speculation is necessarily based upon inferring, theorizing, or predicting the future impact of a statute from incomplete or uncertain evidence. There is no

alternative. However, once a law actually goes into effect, it may have unanticipated consequences.[23]

Such a standard tempts plaintiffs to rely on exaggeration, unsupported theories, and speculation about what the impact of the law *might* be. Under such circumstances, state officials defending the law are put at a distinct disadvantage. Challengers in a facial challenge can drag in every conceivable geographic, political, economic, or social condition in a state – a "parade of horribles," or worst-case scenarios – claiming that the law will cause all of them. To apply the standard in a facial challenge will yield inconsistent results among different States even if the laws are identical on their faces, as each State possesses different geographic, political, economic, and demographic factors. The real legal question should concern the actual impact of the law itself and how fairly state officials have enforced it.[24]

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[23] The decreasing pregnancy rate in Minnesota is an excellent example of unexpected results. *See supra* n.20.

[24] The irony of the application of the "large fraction" facial challenge standard in *Casey* was that the Court ignored the actual experience of Utah, where a spousal notice provision was in effect for 18 years without a single documented incident of related domestic abuse. *See Jane L. v. Bangerter*, 809 F. Supp. 865, 876 (D. Utah 1992), *aff'd in part & rev'd in part on other grounds*, 61 F.3d 1493 (10th Cir. 1995). In its facial analysis of the Pennsylvania spousal provision in *Casey*, the plurality considered all kinds of possible horrific results that the provision could produce, without looking at the actual experience in Utah – which demonstrated the fallacy of the worst-case scenarios speculated by the Court. *See Casey*, 505 U.S. at 887-98. This fallacy is also shown through the experience of the Hyde Amendment, which opponents incorrectly predicted would result in increased maternal deaths. J. Gold & W. Cates, Jr., *Restriction of Federal Funds for Abortion: 18 Months Later*, 69 AM. J. PUB. HEALTH 929 (1979); D.B. Petitti & W. Cates, Jr., *Restricting Medicaid Funds for Abortions:*

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The likelihood of unanticipated consequences is heightened when a self-interested, profit-motivated business, like the abortion industry, is free to claim practically anything it wants about the *possible* impact of a statute. This is the case here, where the court record is devoid of testimony from minors seeking abortion and consists solely of the testimonies of those parties who stand to gain financially if the statute is struck down. The Respondents asked the lower courts to hold the State accountable for a variety of factors over which it has no control (*i.e.*, lack of good communication in families, parents urging their children not to have abortions, etc.) and accept their unsubstantiated claims that these factors create an "undue burden" on a "large fraction" of minors seeking abortions.

For similar reasons, the *Casey* "large fraction" standard makes it virtually impossible for state legislators to reliably predict whether a particular parental notification bill – or any abortion law – will be constitutional. In assessing the constitutionality of an abortion bill, the legislators have to assess how a federal court might evaluate each of the three prongs of the test. They then have to assess how those prongs will be evaluated in the particular geographic, political, economic, and sociological context of their own state. With the courts confused as to the application of the traditional facial challenge standard versus the *Casey* "large fraction" standard, state legislators are left to speculate the constitutionality of their bills.

Projections of Excess Mortality for Women of Childbearing Age, 67 AM. J. PUB. HEALTH 860 (1977).

IV. BECAUSE OF THE SUBSTANTIAL HEALTH RISKS FROM ABORTION TO MINORS, IT IS NOT JUSTIFIABLE TO EXEMPT STATE PARENTAL NOTICE LAWS, LIKE FIRST AMENDMENT OVERBREADTH, FROM THE TRADITIONAL FACIAL CHALLENGE STANDARD.

As documented in amici briefs currently before this Court, abortion entails serious health risks to women of any age, and the immaturity of minors entails special risks. Indeed, medical studies over the last three decades have created substantial data on five significant risks from abortion: increased risk of placenta previa;[25] risk of premature birth in subsequent pregnancies;[26] increased risk of mental distress or suicide;[27] loss of the protective effect of

[25] *See, e.g.*, M.S. Hendricks et al., *Previous Cesarean Section and Abortion as Risk Factors for Developing Placenta Previa*, 25[2] J. OBST. GYN. RES. 137 (Apr. 1999); C.V. Anath et al., *The Association of Placenta Previa with History of Cesarean Delivery and Abortion: A Meta-analysis*, 177 AM. J. OBST. GYN. 1071 (1997); V.M. Taylor et al., *Placenta Previa in Relation to Induced and Spontaneous Abortion: A Population-Based Study*, 82 OBST. & GYN. 88 (1993).

[26] *See, e.g.*, A. Conde-Agudelo et al., *Effect of the Interpregnancy Interval after an Abortion on Maternal and Perinatal Health in Latin America*, 89 INT'L J. GYN. OBST. S34 (Supp. Apr. 2005); C. Moreau et al., *Previous Induced Abortions and the Risk of Very Preterm Delivery: Results of the EPIPAGE Study*, 112[4] BRIT. J. OBST. GYN. 430 (Apr. 2005); P.Y. Ancel et al., *History of Induced Abortion as a Risk Factor for Preterm Birth in European Countries: Results of the EUROPOP Survey*, 19[3] HUMAN REPROD. 734 (Mar. 2004); Brent Rooney & Byron C. Calhoun, *Induced Abortion and Risk of Later Premature Births*, 8[2] J. AM. PHYSICIANS & SURGEONS 46 (Summer 2003).

[27] *See, e.g.*, Jesse Cougle et al., *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, 9[4] MED. SCI. MONITOR CR157 (2003); John M. Thorp et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58[1] OBST. GYN. SURVEY 67 (Jan. 2003); P.K. Coleman et al., *State-Funded Abortions Versus Deliveries: A Comparison of*

(Continued on following page)

full-term pregnancies against breast cancer;[28] and increased risk of substance abuse.[29]

Some of the data substantiating these risks was not available when this Court decided *Casey*. One landmark article in 2003 examined medical studies on abortion between 1966 and 2002 in order to assess the long-term physical and psychological health consequences of induced abortion. Thorp, *supra*, at 68-69. The researchers concluded that women contemplating abortion should be informed of the following: their risk of subsequent preterm birth will be elevated; they will lose the protective effect of a full-term delivery on their lifetime risk of breast carcinoma; there are increased rates of placenta previa after abortion; and the disputed independent risk of induced abortion on breast cancer risk. *Id.* at 77. The study also found that induced abortion increases the risks for mood disorders "substantial enough to provoke attempts of self-harm." *Id.* at 67.

Left to their own devices, minors cannot adequately monitor these significant health risks.[30] These significant

Outpatient Mental Health Claims Over Four Years, 72[1] AM. J. ORTHOPSYCHIATRY 141 (Jan. 2002); M. Gissler et al., *Suicides After Pregnancy in Finland, 1987-1994: Register Linkage Study*, 313[7070] BRIT. MED. J. 1431 (Dec. 7, 1996).

[28] *See, e.g.*, Thorp, *supra*; J.R. Daling et al., *Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion*, 86[21] J. NAT'L CANCER INST. 1584 (Nov. 2, 1994).

[29] *See, e.g.*, P.K. Coleman et al., *Substance Use Among Pregnant Women in the Context of Previous Reproductive Loss and Desire for Current Pregnancy*, 10[2] BRIT. J. HEALTH PSYCHOLOGY 255 (May 2005).

[30] Minors also cannot adequately monitor potential substandard credentials of abortion providers or unsafe conditions in clinics.

health risks justify the application of the traditional facial challenge standard to challenges to parental notice and consent statutes. Likewise, these risks justify a strict medical emergency exception. The traditional facial challenge standard is also necessary to focus federal courts on more than simply increasing access to and minimizing the costs of abortion for minors.

Abortion litigation is unique because *Singleton v. Wulff* empowered abortion providers to represent women in abortion litigation and to challenge statutes that regulate the provider in seeking to protect minors. 428 U.S. 106 (1976). In this unique context of abortion litigation, a facial challenge voids a statute completely, vests abortion providers with absolute discretion, and eliminates common sense regulations. Yet if the traditional facial challenge standard is utilized, failure to demonstrate facial invalidity would compel the abortion providers to resort to an as-applied challenge and a real-life factual demonstration involving the particular abortion provider. Requiring such a challenge would appropriately induce the federal courts to ask serious, probing questions about whether a statute is in fact an "undue burden" or any burden at all compared to the benefit it provides. *See Casey*, 505 U.S. at 873-75 (stating that not every burden is undue).

For these reasons, overbreadth doctrine is inappropriate for abortion litigation. It was created in and confined to the First Amendment context because of the unique concern about chilling speech.[31] That concern is not present in

[31] Moreover, overbreadth alone is not enough even in the First Amendment context. Rather, there must be *substantial overbreadth*. *See Broadrick v. Okla.*, 413 U.S. 601, 615 (1973); *Gooding v. Wilson*, 405 U.S. 518, 520-23 (1972). This Court has specifically acknowledged more

(Continued on following page)

abortion litigation.[32] The medical risks to minors, combined with the unique problem of minors' immaturity, outweigh any concern about "chilling" abortion on demand for minors. Overbreadth in the abortion context would undermine thorough review of challenges to common sense regulations and would eviscerate the compelling interests – such as protecting minors from the heightened risks of placenta previa, premature birth, psychological trauma, and substance abuse[33] – that the States have in common sense regulations.

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than once that "application of the overbreadth doctrine is 'strong medicine' that should be invoked only 'as a last resort.'" *See, e.g., Munson*, 467 U.S. at 958 (quoting *Broadrick*, 413 U.S. at 613). Abortion is not entitled to equivalent protection as an exception to the facial challenge rule.

[32] *See* Part I.C., *supra*.

[33] In addition, there is a compelling need to protect minors from statutory rape and sexual abuse. *See, e.g., Manning*, 119 F.3d at 266 (stating that an injunction of the North Carolina parental consent statute would mean the State would have "one less avenue to discover the sexual abuse of children and [to] take action to protect" the innocent minors).

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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August 8, 2005

APPENDIX

New Hampshire Parental Notice Statute

§ 173:1 Legislative Purpose and Findings.

I. It is the intent of the legislature in enacting this parental notification provision to further the important and compelling state interests of protecting minors against their own immaturity, fostering the family structure and preserving it as a viable social unit, and protecting the rights of parents to rear children who are members of their household.

II. The legislature finds as fact that:

(a) Immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences.

(b) The medical, emotional, and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature.

(c) The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of abortion are not necessarily related.

(d) Parents ordinarily possess information essential to a physician's exercise of best medical judgment concerning the child.

(e) Parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after the abortion.

III. The legislature further finds that parental consultation is usually desirable and in the best interest of the minor.

§ 173:2 New Subdivision; Parental Notification Prior to Abortion. Amend RSA 132 by inserting after section 23 the following new subdivision:

Parental Notification Prior to Abortion

§ 132:24 Definitions.

In this subdivision:

I. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

II. "Commissioner" means the commissioner of the department of health and human services.

III. "Department" means the department of health and human services.

IV. "Emancipated minor" means any minor female who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents.

V. "Guardian" means the guardian or conservator appointed under RSA 464-A, for pregnant females.

VI. "Minor" means any person under the age of 18 years.

VII. "Parent" means one parent of the pregnant girl if one is living or the guardian or conservator if the pregnant girl has one.

§ 132:25 Notification Required.

I. No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

II. The written notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

III. In lieu of the delivery required by paragraph II, notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and with restricted delivery to the addressee, which means the postal employee shall only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

§ 132:26 Waiver of Notice.

I. No notice shall be required under RSA 132:25 if:

(a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice; or

(b) The person or persons who are entitled to notice certify in writing that they have been notified.

II. If such a pregnant minor elects not to allow the notification of her parent or guardian or conservator, any

judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests and shall authorize an abortion provider to perform the abortion without such notification if said judge concludes that the pregnant minor's best interests would be served thereby.

(a) Such a pregnant minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.

(b) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor. In no case shall the court fail to rule within 7 calendar days from the time the petition is filed. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(c) An expedited confidential appeal shall be available to any such pregnant minor for whom the court denies an order authorizing an abortion without notification. The court shall make a ruling within 7 calendar days from the time of the docketing of the appeal. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant minor at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant minor 24 hours a day, 7 days a week.

§ 132:27 Penalty.

Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bone fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

§ 132:28 Severability.

If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications, and to this end, the provisions of this subdivision are severable.

§173:3 Effective Date. This act shall take effect December 31, 2003.

Minnesota Parental Notice Statute[1]

§ 144.343.

(1) Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

(2) Notwithstanding the provisions of section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor. . . . [u]ntil at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

(a) The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee which means postal employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

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[1] This statute was upheld in *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

(3) For purposes of this section, "parent" means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one.

(4) No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

(5) Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman regarding information necessary to comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

(6) If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order,

subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition to the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

(c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if the judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.

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(14)

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In The
Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

BRIEF OF HARLON REEVES, INDIVIDUALLY, AND AS NEXT FRIEND OF HIS MINOR DAUGHTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND IN SUPPORT OF REVERSAL

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SECONDARY SOURCES

American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy – Current Trends and Issues: 1998*, 103 PEDIATRICS 516 (1999), also available on the worldwide web at <http:// www.aap.org/policy/re9828.html> 4, 5

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Patricia Donovan, *Caught Between Teens and the Law: Family Planning Programs and Statutory Rape Reporting*, 3 FAMILY PLANNING PERSPECTIVES 5 (1998) 7

HP Gershenson, et al., *The Prevalence of Coercive Experience Among Teenage Mothers*, J. INTERPERS. VOL. 204 (1989) 4

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NARAL Pro-Choice America Foundation, *Who Decides?: The Status of Women's Reproductive Rights in the United States; Restrictions on Young Women's Access to Abortion* (June 24, 2005) (http://naral.org/yourstate/whodecides/trends/issues_young_women.cfm (last visited August 3, 2005) 14

Parental Notification of Abortion: Hearings on H.218 Before the House Judiciary Comm., 2001-2002 Legis. Sess. (Vt. 2001) (testimony of Nancy Mosher, President and CEO of Planned Parenthood of Northern New England on April 16, 2001) 7

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is Harlon Reeves, individually, and as Next Friend of his minor daughter.[2] Mr. Reeves resides in Texas and is the father of two daughters. One of his daughters, a girl who is mentally challenged, was the unfortunate victim of a child predator when she was only 12 and 13 years of age. As a mentally challenged young girl, she was in desperate need of protection from the evils of this world, such as protection provided by parental notice or parental consent laws. This daughter, who the father requests only be identified as Jane,[3] was sexually assaulted on at least two different occasions by a live-in boyfriend of her mother, with whom Jane was living at the time. Mr. Reeves and Jane's mother were divorced at the time of the sexual assaults suffered by Jane in approximately 1994 and 1995, while Jane was 12 and 13 years of age. Mr. Reeves lived at a different residence than his daughter Jane at the time Jane was sexually assaulted and was horrified at the lack of notification to protect his daughter.

Twice the sexual assaults suffered by Jane resulted in her becoming pregnant. Jane's perpetrator forced her to

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties have authored this brief in whole or in part and no one other than amicus or its counsel contributed money or services to the preparation and submission of this brief.

[2] Due to the sensitive nature of this matter, Harlon Reeves requests that his younger daughter remain unnamed in this brief and in any reference to this brief.

[3] Due to the sensitive nature of this matter, Harlon Reeves requests that his other daughter, who was sexually abused and mentally traumatized, be referred to by the pseudonym, Jane, which is not her real name.

have an abortion to terminate both pregnancies, abortions which were performed at an abortion clinic in Fort Worth, Texas. Neither of Jane's parents were notified of either of the abortions by the abortion clinic. If either of Jane's parents would have been notified of the abortion, the live-in boyfriend would not have been able to continue his sexual abuse of Jane and he would not have been able to circumvent the parental rights of Jane's parents. When the parents finally realized the evil done by this man to their defenseless daughter, the assaults and abortions had already occurred. Jane's perpetrator was subsequently criminally prosecuted and was sentenced to approximately 30 years in prison for his crimes.

At the time when Jane was victimized, Texas had no law requiring parental notification before the performing of an abortion on a minor. Jane, being mentally challenged, was in the most vulnerable position of any minor, yet there was no law to protect her. The lack of such law allowed Jane to be repeatedly abused, and denied her parents the ability to protect her from such an atrocious crime. Jane is no longer a minor, but Mr. Reeves has another daughter who is currently a minor. Mr. Reeves knows first hand the devastation that can occur when states do not require a parent to be notified of a minor's request to have an abortion. Mr. Reeves also knows that his younger daughter and other young girls across the country could find themselves faced with the same type of horror if this Court allows parental notification laws to be struck down across the country.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to protect innocent young girls and the rights of their parents to protect their daughters and stay informed of any medical attention they request. This Court has previously upheld the right of states to require parental notification before the performing of an abortion on a minor, expressing support for the role of parents in this crucial decision and recognizing the benefit that comes from such parental involvement.[4] Parental notification is the least amount of protection that a state can provide regarding the interest of safety and health of young girls. Parental notification not only protects the rights of parents to fulfill their responsibility to protect their daughters, it also provides protection for minor girls who can be exploited.

Heinous criminals are taking advantage of the lack of state laws that require parental notification for abortions performed on minors, sexually abusing little girls and forcing them to have abortions to conceal their crime. This Court should protect these young girls and the right of their parents to know to what their daughters are being subjected. Otherwise, the lack of such parental notification laws allow sexual predators to continue to rape and devastate the lives of young girls, forcing them to have sex and then forcing them to abort the life that has been created, all against their will.

[4] *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992), citing *Ohio v. Akron Center For Reproductive Health et al.*, 497 U.S. 502, 510-519 (1990).

ARGUMENT

I. Lack of parental notification laws allow child predators to prey on minors without the threat of prosecution.

Men who prey on and sexually abuse minor girls are aware that they can force a girl to have an abortion, thereby covering up their crime. National studies on the issue of minors being sexually abused and impregnated by older adult men indicate that "[a]lmost two thirds of adolescent mothers have partners older than 20 years of age."[6] In California, researchers using a study of over 46,000 pregnancies by school-age minor girls discovered that "71%, or over 33,000, were fathered by adult post-high-school men whose mean age was 22.6 years, an average of 5 years older than the mothers. . . . Even among junior high school mothers aged 15 or younger, most births are fathered by adult men 6-7 years their senior. Men aged 25 or older father more births among California school-age girls than do boys under age 18."[6] In fact, there is a collection of studies that have found that most teenage pregnancies are the result of male child predators' sexual acts, by adult men who are substantially older.[7]

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[5] American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy – Current Trends and Issues: 1998*, 103 PEDIATRICS 516, 519 (1999), also available on the worldwide web at <http://www.aap.org/policy/re9828.html>.

[6] Mike A. Males, *Adult Involvement in Teenage Childbearing and STD*, LANCET 64 (July 8, 1995).

[7] *Id.* citing HP Boyer and D. Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment*, FAM. PLAN. PERSPECTIVES at 4 (1992); and HP Gershenson, et al., *The Prevalence of Coercive Experience Among Teenage Mothers*, J. INTERPERS. VIOL. 204 (1989). "Younger teenagers are especially vulnerable to coercive and nonconsensual sex.

(Continued on following page)

The case of Jane Reeves led to a parental notification law in Texas. Mr. Reeves, individually and on behalf of his daughter Jane, ultimately filed a lawsuit against the abortion clinic that performed the two abortions on Jane, when Jane was 12 and the next year when she was 13, without prior consent or notification provided to Mr. Reeves.[8] At the time of both of the forced abortions, Jane had a low cognitive level, equivalent to that of an 8-year-old. Before the first abortion, Jane was so scared and traumatized that she vomited outside the clinic in the bushes. Mr. Reeves found out about the two abortions from an employee of the Texas Department of Protective and Regulatory Services. The clinic grew suspicious about the second abortion, but they still performed the abortion and received payment, waiting until later to notify authorities.

An employee of the Texas Department of Protective and Regulatory Services informed Mr. Reeves of its investigation and suggested that Jane be removed from her mother's home and either be placed in Mr. Reeves' custody or otherwise she would be sent to a foster home. The lawsuit was favorably settled in 1998. The tragedy of Mr. Reeves and his daughter Jane caught the attention of the Texas Legislature and in 1997, a new law was proposed that would require parental notification before an abortion can be performed on a minor. Additionally, Mr. Reeves testified in front of a Texas Senate committee, to voice his

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Involuntary sexual activity has been reported in 74% of sexually active girls younger than 14 years and 60% of those younger than 15 years." American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy – Current Trends and Issues: 1998*, 103 PEDIATRICS 516 (1999).

[8] See *Harlon Reeves, et al. v. West Side Clinic, Inc.*, Cause No. 141-165086-96, 141st Judicial District of Tarrant County (1997).

support of a parental notification law before an abortion can be performed on a minor. The 1997 law was unsuccessful, but the parental notification law was passed in Texas in 1999, signed by then Governor Bush, and remains the law today.[9] Had such a law be in effect at the time of the sexual abuse against Jane, the sexual abuse would not have continued and at least one of Jane's parents would have been informed that Jane had been raped, thereby putting an end to any further contact by the live-in boyfriend sexual predator and Jane. Additionally, if such a law had been in place, Jane would not have been subjected to a second forced abortion, taking away Jane's right to choose life for her child, and get the advice, involvement and protection of her parents.

Even though there were signs of trouble, the abortion clinic performed the abortion a second time on Jane and asked questions later. This type of nonreporting will likely lead the sexual abuse to continue against the minor. These abortion clinics have a pecuniary interest in performing such abortions, making it unlikely that they will protect young girls from child predators without a law that requires clinics to notify parents that an abortion is to be performed.

By not requiring parental notification, there is more of an opportunity for sexual assault to go unreported to the parents and to law enforcement authorities. Child predators may engage in sexual conduct with minor girls, and then force them to have an abortion, without the parents even finding out, when notification is not required. If child predators knew that they could not hide their crime by

[9] TEX. FAM. CODE ANN. §§ 33.001 et seq. (Vernon 1999).

forcing the minor girl to have an abortion, they arguably would be less likely to engage in such acts. On the contrary, these crimes against girls would be brought out into the open if the parent is at the very least notified that the daughter is seeking an abortion.

What is equally as tragic is that some clinics where the abortions are being performed are hesitant to report abortions for minor girls who have been sexually assaulted by an adult man.[10] Also, such a girl, forced by her abuser, can easily deceive the clinic's staff, to avoid accurate reporting of such crime.

Even more striking is that Planned Parenthood of Northern New England, which is the largest abortion provider in the state of Vermont and a party before this Court, admitted that it has a "legal obligation to report instances of sexual assault" but did not report such instances.[11] This information was uncovered as a result of testimony before the Judiciary Committee of the Vermont House of Representatives.[12] This testimony also revealed that twelve girls under the age of sixteen had an abortion in 2000 performed by Planned Parenthood, pregnancies which arguably resulted from illegal sexual acts on the girl

[10] Patricia Donovan, *Caught Between Teens and the Law: Family Planning Programs and Statutory Rape Reporting*, 3 FAMILY PLANNING PERSPECTIVES 5 (1998).

[11] See Parental Notification of Abortion: Hearings on H.218 Before the House Judiciary Comm., 2001-2002 Legis. Sess. (Vt. 2001) (testimony of Nancy Mosher, President and CEO of Planned Parenthood of Northern New England on April 16, 2001); See also Teresa Stanton Collett, *Issue In Vermont Law: Protecting Our Daughters: The Need for the Vermont Parental Notification Law*, 26 VT. L. REV. 101, 120 (Fall 2001).

[12] *Id.*

by an adult man.[13] Planned Parenthood's representative testified that Planned Parenthood did **not** notify the authorities in any of these cases.[14] This Planned Parenthood representative also could not identify any cases of reported abuse in 2000.[15] Based on this shocking information, it is difficult to believe that young girls and their parents can rely on abortion providers to act as a safeguard of protection from sexual predators and molesters.

Furthermore, the lack of reporting may make it more difficult to prosecute the sexual abuser. The lack of reporting can lead to the fetal tissue from the abortion not being preserved, making it nearly impossible to demonstrate sexual contact by the alleged sexual abuser, making it more possible to dismiss the case.[16]

II. Many others have suffered a similar fate as Jane.

Jane is not alone in her tragedy. Other young girls have suffered through a similar ordeal. For instance, in Bridgeport, Connecticut in 2002, a **75**-year-old man, Jimmy Kave, admitted to having sex with an **11**-year-old girl, but according to police, the man claimed that the girl "**enticed him**."[17] Further damage occurred when the minor

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Commonwealth v. Sasville*, 616 N.E.2d 476 (Mass. App. Ct. 1993) (commonwealth's failure to preserve aborted fetus for examination by a defendant charged with rape required the dismissal of the indictment against the defendant). See also *Anderson v. State*, 544 A.2d 265 (Del. 1988) (court suggested that evidence of abortion tends to establish penetration requirement for rape conviction).

[17] See Colin Poitras, *Privacy Rights Vs. Sexual Abuse; Two Doctors Defend Decision Not to Report 11-Year-Old's Pregnancy*, THE HARTFORD COURANT, August 23, 2002, at A1.

girl appeared at the office of two doctors, who conducted a test that revealed that "she might be pregnant," but the doctors never informed anyone, including the girl's mother of the possibility of sexual abuse.

Lawyers for the doctors, and the doctors themselves argued that reporting of sexual activity of minors "violates the sanctity of the doctor-patient relationship" and "such a broad interpretation of the state's child abuse reporting law could discourage sexually active minors from seeking the important medical treatment and counseling they might need." In other words, counseling and confidentiality are more important than protecting minor girls as young as **11** from repeated rape and molestation, allowing the criminal to continue his deplorable acts. The doctors also hid behind the argument that the "state's mandatory reporting laws in effect at the time only required doctors to report possible child sexual abuse if it involved a parent, caregiver, or person given access to a child by a parent or caregiver."[18]

Thankfully, the Connecticut General Assembly amended its reporting laws to make it absolutely clear that "physicians are required to report all suspected child abuse."[19] This story shows that young girls can continue to be raped and molested repeatedly without a parent being notified unless a state has a law that specifically forces such notification, with the threat of criminal prosecution. If this Court strikes down the New Hampshire Parental Notification law, it will call into question similar laws of other states, making minor girls across our nation vulnerable to the attacks of sexual criminals.

[18] *Id.*

[19] *Id.*

Another horrific sex assault of a minor occurred in Seminole County, Florida, where a 30-year-old deputy sheriff was charged with multiple counts of illegal sexual activity with a child, a 15-year-old girl, which was later dropped to one count of lewd and lascivious activity on a minor after the deputy pleaded no contest to such act.[20] The 15-year-old girl was impregnated by the then deputy sheriff, and continually deceived the girl's parents while he continued to engage in such acts with their daughter, later taking her to get an abortion to conceal his illegal acts, without the parents' knowledge.

Additionally, a Planned Parenthood affiliate in Arizona was sued and ruled liable in civil court for failing to report an abortion on a **12**-year-old girl performed by the clinic. The girl was impregnated by her twenty-three year old foster brother. Thereafter, the girl remained at the foster home, which led to her being raped and impregnated a second time.[21]

These minor girls not only deserve to be protected from such sexual assaults, but they also have a fundamental right to the protection and guidance of their parents. See *Bellotti v. Baird*, 443 U.S. 622, 637 (1979). In *Bellotti*,

[20] Sharon McBreen, *Deputy Arrested On Sex Charges; Sheriff Don Eslinger Fired Andre Demetri Golden, Who Is Accused of Having An Affair with a 15-Year-Old Girl*; ORLANDO SENTINEL TRIBUNE, June 14, 1996, at D1; See also Beth Taylor, *Deputy May Avoid Prison In Sex Case: The Seminole Deputy Has Agreed to Plead No Contest to Having Sex With a 15-Year-Old Girl*, ORLANDO SENTINEL TRIBUNE, December 10, 1996, at D3.

[21] *Jane Doe v. Planned Parenthood of Central and Northern Ariz., et al.*, No. CV 2001-014876, Order of Partial Summary Judgment (Superior Ct., Ariz., Cty. of Maricopa, Nov. 26, 2002). See *Glendale Teen Files Lawsuit Against Planned Parenthood*, THE ARIZONA REPUBLIC, Sept. 2, 2001.

the Supreme Court stated, "the guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors." *Id.* This Court stated the following:

> Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for full growth and maturity that make eventual participation in a free society meaningful and rewarding.

Belotti, 443 U.S. at 638-39. The prudent action to take regarding parental notification is to uphold such laws and allow the burden to be on the exercise of the exceptions to such provisions.

III. Parental notification laws protect minors from repeated sexual abuse, a universal principle supported by this court.

This Court's concept of family includes within it principles that support the notion that a parent should at least have knowledge of any medical treatment of his/her minor child.[22] Similarly, this Court has previously recognized that

[22] See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.' *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). See also *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience,. and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of

(Continued on following page)

parents have a "fundamental liberty interest in the care, custody and management" of their children. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). Parental autonomy is not delegated by the state, but rather resides in the very nature of parenthood. *Yoder*, 406 U.S. at 232. Regarding the legal heritage of parenthood apart from the power of the state, this Court recognized that, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (internal citations omitted). In fact, the need for parental involvement, "is at its zenith when the decision as to which parental involvement is urged is one – like the abortion decision – with profound and enduring consequences not merely for the physical well-being of the child, but for the child's spiritual, moral, and emotional development."[23]

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their children. 1 WILLIAM BLACKSTONE, COMMENTARIES *447; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *190").

[23] *Planned Parenthood v. Camblos*, 155 F.3d 352, 368-69 (4th Cir. 1998) ("See *Bellotti*, 443 U.S. at 637-38, 640, See also *Planned Parenthood v. Danforth*, 428 U.S. 52, 103 (1976) (Stevens, J., concurring in part and dissenting in part) ("Even if [the abortion decision] is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative"); *Casey*, 505 U.S. at 899-900 (explaining that waiting period required by informed parental consent provision legitimately provided "the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral or religious principles of their family"); *Hodgson v. Minnesota*, 497 U.S. 417, 480 (1990) (Kennedy, J., concurring in the judgment in part, and dissenting in part) (describing abortion decision as a "grave" one, and observing that "a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support") (quoting *Bellotti*, 443 at 641)").

IV. Parental notification is the least amount of protection that a state can provide, protection that has wide support.

Parental notification is the least amount of protection that a state can provide to shield young girls from sexual assault by adult men. Parental notification not only protects the rights of parents to fulfill their responsibility to protect their daughters, it also provides protection for minor girls who can be exploited. If the Court strikes down this law, it will undoubtedly result in real harm to young girls – allowing rapists and child molesters cover to repeatedly abuse young girls and continue to hide their tracks.

Numerous polls taken from 1998-2005 reveal support for parental consent or notification laws regarding abortion in the range of 73-83% of adults/registered voters polled.[24] Additionally, pro-choice advocates agree that parents should not only be notified, but be "involved" in the process

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[24] See National Right to Life: Polls on Requiring Parental Involvement in Minors' Abortions, April 28, 2005; Fox News/Opinion Dynamics Poll, April 25-26, 2005-78% favor requirement of state law to notify at least one parent or guardian before a minor has an abortion; Quinnipiac University Poll, March 2-7, 2005-75% favor requiring parental notification be a minor can get an abortion; CNN/USA Today/Gallup, January 10-12, 2003-73% favor requirement of parental consent before minor can get any abortion; Wirthlin Worldwide, October 19-22, 2001-83% favor requirement of notifying one parent before an abortion is performed on a minor; Los Angeles Times, June 8-13, 2000-82% favor requirement that minor get consent of at least one parent before having an abortion; CBS News/NY Times, January 1998-78% favor parental consent before minor can have an abortion. Poll results available at http://www.nrlc.org/federal/ccpa/ParentalPolls042904.html (last visited August 3, 2005).

when their minor daughters are pregnant.[25] Therefore, not only is the concept of parental notification supported by fundamental rights of parents guaranteed by the law, parental notification is widely supported and thus should be encouraged and remain codified into the law.

V. Any balance of harm of the right to an abortion should be weighed in favor of protecting minors from sexual predators.

If the Court is going to balance the right to an abortion versus the safety and protection of minor girls from sex assault and forced abortions, the Court should favor protecting minor girls by the simple act of notifying a parent of such abortion. The amount of time that a minor has to wait, 48 hours, to notify a parent is a minimal amount of time compared to the harm that can occur from abuse or repeated abuse.

Mr. Harlon Reeves beseeches this Court to carefully consider the far reaching implications of its decision. Numerous federal courts across the country are jeopardizing the safety and welfare of minor girls and denying the protection and guidance from their parents by striking down essential parental notification laws regarding abortion. These parents simply want to be notified before an abortion is performed on their minor daughter. Granting such a request sends a message to parents and young girls

[25] "NARAL Pro-Choice America believes that loving and responsible parents should be involved when their daughters face crisis pregnancies." NARAL Pro-Choice America Foundation, *Who Decides?: The Status of Women's Reproductive Rights in the United States; Restrictions on Young Women's Access to Abortion* (June 24, 2005) (http://naral.org/yourstate/whodecides/trends/issues_young_women.cfm) (last visited August 3, 2005).

alike, that parents have a vital role in the welfare of their children, a responsibility and a duty to know and protect their health, by, at the least having knowledge of a serious medical operation such as an abortion.

CONCLUSION

This Court should reverse the decision of the court of appeals below and affirm that the decision regarding pregnancy is of great importance and deserves the attention of at least one parent to be notified before a minor receives an abortion. In addition, this Court should be mindful of the devastation that parents and minor girls have suffered because of the lack of a parental notification law regarding abortion, and the potential devastation that will no doubt spread to the State of New Hampshire and other states if these states are not permitted to have a parental notification law regarding abortion. If a minor is required to have ***in-person* parental consent** just to use a **tanning bed**, then certainly mere parental **notification** for a **major medical procedure** (abortion) is constitutionally permissible, especially given the protection such notification affords against sexual predators. *See* N.H. REV. STAT. ANN. § 313-A:31 (2005).

Respectfully submitted,

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CASE # 04-1144

In The Supreme Court Of The United States

Kelly A. Ayotte, Attorney General of New Hampshire

PETITIONER

Vs.

Planned Parenthood of Northern New England, et al.

RESPONDENT

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF MARGIE RILEY AND LAURETTE ELSBERRY AS AMICII CURIÆ IN SUPPORT PETITIONER WITH APPENDIX

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THE QUESTIONS PRESENTED FOR REVIEW

1. Did the United States First Circuit Court of Appeals apply the correct standard in a facial challenge to a statute regulating abortion when it ruled that the *undue burden standard* cited in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) applied rather than the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)?

2. Whether the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 (2003) preserves the health and life of the minor through the Act's judicial bypass mechanism and/or other state statutes?

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Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409 (1900) 15

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3 Rotunda, TREATISE ON CONSTITUTIONAL LAW § 23.33, p. 512 (1986) 7

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Aquinas, Summa Theologiæ, 1, q. 76, a. 5 and q. 118 14

Aristotle, Politics, VII, I335b, 24-26 14

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Halsbury's Laws of England (1st Ed, 1911) Infants §§ 132, 135 14

Hobbes, LEVIATAN (1651) 15

International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984 20

Jacobs, et al, MDs, OBSTETRICS AND GYNECOLOGY, FAMILY HEALTH & MEDICAL GUIDE (1979) 20

Laqueur, THE HUMAN RIGHTS READER (1979) 15

Locke, SECOND TREATISE OF GOVERNMENT (1690) 15

Lynch, ABORTION AND INALIENABLE RIGHTS IN AMERICAN JURISPRUDENCE, http

//users.cwnet.com/jjlynch/ProlifePages/ABORTION.DOC (© 1987) 3, 10, 13, 14, 20

Lynch, *Posterity: A constitutional Peg for the Unborn*, 45 AJJ 401 (Notre Dame Law School. 1995) 3, 10, 20

Magna Carta (1215) 3

McKechnie, *Magna Carta*; The Great Charter of King John 12, 13, 14, 19

Milton, AREOPAGITICA (1644) 14

Noonan, CONTRACEPTION, 86-88 (Harv. U. Press, 1965) 14

Notes, Fourteenth Amendment Personhood; Fact or Fiction?, 73 St. John's Law Review 495, 530-40 (1999) 10, 20

Restatement, Contracts (1st) § 77 16

Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 15

Strahan, Legal Protection of the Unborn Child Outside the Context of Induced Abortion, 11 Association for Interdisciplinary Research in Values and Social Change (March/April 1997 12

Verdross, *Forbidden Treaties In International Law*, 31 AJIL 571 (1937) 16, 19

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF INTEREST[1]

Amicii are individual activists seeking an end to abortion as it impinges on a member of Sovereignty, Posterity. They share the views of counsel who has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, downtrodden, and oppressed.

Margie Reilly graduated from St. John's University, Jamaica, New York with a *summa cum laude degree* in Management. Number two in her class, Beta Gamma Sigma Business Honor Society. She is the granddaughter of a former United States Congressman John Rainey of Illinois, deceased. Most of her career has been with the Federal Government: Defense Logistics Agency, NYC, NY and McClellan AFB, N Highlands, CA as well as Social Security Administration where she retired early as a service representative. She is now employed as a substitute schoolteacher with San Juan Unified School District and Sacramento City School District where she takes K-12 assignments on a part time basis and specializes in preschool and Head Start early childhood programs. She has been actively involved in the prolife movement for many years as a sidewalk counselor, member of her Diocesan prolife committee and supports many prolife causes including Priests for Life, American Life League, Prolife Action League of Chicago, National Right to Life, Bishop Gallegos Maternity Home,

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[1] Lead Counsel for *Amicii Curiae* authored this brief in its entirety in collaboration with the Pacific Justice Institute. No person or entity, other than the Pacific Justice Institute and the named *Amicii curiae*, associates, supporters, or counsel, made a monetary contribution to the preparation or submission of this brief.

SOHLNET, Couple to Couple League, Loaves and Fishes, and Sacramento Food Bank and other worthy charities. She participated in the Washington, D.C. March for Life in 2001, and the San Francisco, CA March for Life in 2004. Most recently, she testified before the Sacramento County Board of Supervisors against a "no protest bubble zone" that stifled the free speech rights of prolife activists at abortion clinics and medical facilities in the County.

Laurette Elsberry has been employed over 40 years by the State of California, the most recent 20 years as a criminal analyst, has been victimized for her prolife activities and participated in the editing a number of briefs on the abortion issue. She has been active in many educational projects involving abortion and has participated in vigils for the unborn. She has also given testimony at the State Supreme Court regarding the qualifications of State Court Justices.

Lead Counsel is affiliated with the Pacific Justice Foundation, and has presented similar *Amicii Curiae* Briefs in this court,[2] a former professor of Law, University of Northern California, Lorenzo Patiño School of Law, affiliated with pro-life groups, has concentrated his practice in the areas of Civil and Human Rights, Constitutional Law, Criminal Defense, and authored two articles: Lynch, ABORTION AND INALIENABLE RIGHTS IN AMERICAN JURISPRUDENCE; A PROSPECTIVE POLICY (© 1987), http://www.jamesjosephlynchjr.com/ProlifePages/ARTICLES/ABORTION.DOC (Hereinafter, LYNCH I); Lynch, *Posterity: A Constitutional Peg for the Unborn*, 45 AJJ 401; http://www.jamesjosephlynchjr.com/Articles/UNDLS.htm (Notre Dame Law School. 1995) (Hereinafter, LYNCH II); He lived four years in England where he engaged in a self-directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

[2] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (For Appellant); *Ohio v. Akron Reproductive Center*, 497 U.S. 502 (1990) (For Appellant); *Hodgson v. Minnesota v. Hodgson*, 497 U.S. 417 (1990) (For Minnesota; 2 Briefs); *Bray v. Alexandria*, 506 U.S. 263 (1993) (For Petitioner). Counsel has also presented an *Amicii* brief in other unrelated cases. *Walters* v, *NARS*, 473 U.S. 305 (1925) *(amicus Curiae* Andrew Groza for respondent); *Dickerson v. USA* (*Amicus Curiæ* Rutherford Institute for Petitioner), 530 U.S. 428 (Rutherford Institute for petitioner). While not filed, *Turnock v. Ragsdale*, 503 U.S. 916 (1992) was dismissed after a tentative opening brief was submitted to ACLU for review prior to filing. (For Appellant)

Pacific Justice Institute is a non-profit 501(c)(3) legal organization specializing in the defense of religious freedom, parental rights, protection of life, and other civil liberties. The Institute works diligently, without charge, to provide clients with legal support and assistance in these areas of the law in order to secure the rights and freedoms inherent to all Americans.

This case touches and concerns the First Amendment rights of parental communication with children and the continuing validity *of Roe v. Wade,* 410 U.S. 113 (1973) and its *progeny*, and, as such, a decision herein will affect not only the laws of the State of California, but all of its sister states and territories of the United States.[3] This Court's *Amicii* is concerned about the inclusion of "unborn and partially born children" (hereinafter, "unborn children") as present members of "Posterity" in the Preamble of the Constitution, and convinced then, and *Amicii* is convinced now, that the Court was misled as to the meaning of "personhood." It is *amicii curiae's* belief that "unborn children" are present members of "Posterity" in the Preamble of the Constitution, and it is imperative, for the preservation of a basic respect for human life and the values enshrined in the Constitution of the United States, that these children be recognized as present members of "Posterity" entitled to protection.

[3] Cases are pending appeal regarding the same, or similar issues. See, *Planned Parenthood v. Ashcroft, 9th Cir. # 04-16621; Carhart et al v. Ashcroft*, 8th Cir., # 04-3379; *National Abortion Federation, et al v. Ashcroft*, 2nd Cir., 04-5201.

SUMMARY OF ARGUMENT

1. This court has long recognized that the parent child relationship to be a protected interest that the state may not interfere with, absent arbitrary conduct by the parent which endangers the life, health, or safety of the child, such that the decision below is lacking in sufficient support to be sustained.

2. Unconstitutional conduct cannot be justified by widespread and long use. With respect to the Constitution, *stare decisis* is of less importance than in other areas, and therefore the holding of *Roe v. Wade* and its *progeny* is not necessarily binding on this Court.

3. As this Court has recognized aliens and artificial persons as entitled to protection, it is an anomaly to exclude "unborn children" as entitled to protection given that, while the Preamble does not create rights, it does define for whom the rights were created, which would include the "unborn children" as members of "Posterity," an interpretation that appears to be consistent with the intent of the framers, and a common law understanding, that "unborn children" were persons in being, therefore protected by the Constitution.

4. Since *Roe v. Wade* was decided, Congress, with plenary control over citizenship, appears to have extended the protection of citizenship to the "unborn children" as arguably following under the penumbra of "posterity," which should be accorded the respect due a coordinate branch of government, representing a changed circumstance justifying review.

5. Based upon the foregoing, this court should grant certiorari to resolve whether *Roe v. Wade*, 410 U.S. 113 (1973) and its *progeny* are in fact viable in the face of a growing body of literature that suggests that the court erred.

ARGUMENT

I.

IN VIEW OF THE FIRST AMENDMENT, AND STARE DECISIS, THE PARENT-CHILD RELATIONSHIP, AND COMMUNICATIONS INCEDENTAL THERETO, CANNOT BE RESTRICTED

This court has long recognized that the parent child relationship to be a protected interest that the state may not interfere with. *See, Stanley v. Illinois*, 405 U.S. 645 (1972) (Termination of parental rights); *Mattis v. Schnar*, 502 F.2d 588 (8th Cir. 1974), *vacated* and *remanded sub nom Ashcroft v. Mattis*, 431 U.S. 171; *Santosky v. Kramer* (1982) 455 U.S. 745; *Brower v. County of Inyo*, 489 U.S. 593 (1989). In *Brower*, this court found a protected interest of the parent in their child from which they had standing under 42 U.S.C., § 1983 to sue for the wrongful death of their child. From *Brower*, it follows that any person, acting under color of law who deprives parents of, or otherwise interferes with the communications with, their children would be subject to liability under 42 U.S.C., § 1983.

It is a time-honored tradition of American courts to sustain the governmental interest in health and medical treatment of the populace and override individual religious objections. 4 Rotunda, Treatise on Constitutional Law, Free Exercise, § 21.9(b). However, the context of the cases suggests that this is true only in the area of communicable diseases where vaccination and quarantine is the chief weapon of defense against an epidemic (Id, § 21.9(b)(1).) and where parental powers are exercised to withhold medical treatment for children on religious grounds. Id, § 21.9(b)(2). However, the context of those later cases suggests that the **courts have refused to veto such powers where alternative treatment was provided and beneficial**, or unrelated to preservation of the child's life. Ibid., footnote 21.

The sole justification for the decision below, then, is the District Court's reliance on the *Roe v. Wade* line of cases with respect to parental notification laws that the minor-mother has a right to judicial bypass for consent, and that the procedures instituted by New Hampshire do not adequately prevent the parents learn of the pregnancy. It important at the outset~~, it is important~~ to note that this court has held that notification to the parent is permissible, so long as the parent does not have veto power. This Court has never suggested that a state may not give notice to the Parents.

The instant case is a gross departure in denying parents any input in the raising and upbringing of their child, which this court ought not accept, and, indeed, this court ought now to discard Roe as unsound in principal and unworkable in practice.

II.

STARE DECISIS IS LESS BINDING IN CONSTITUTIONAL ISSUES DESPITE LONG STANDING AND WIDESPREAD PRACTICE; ROE AND ITS PROGENY DID NOT CONSIDER THE TERM "POSTERITY" IN THE PREAMBLE OF THE CONSTITUTION

Statutes or practices inconsistent with the Constitution, however pervasive, cannot create a power that the Constitution does not bestow, nor furnish a construction that the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649 (1891); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1867) (Invalidating USSC rules); *Brown v. Board of Education*, 347 U.S. 483 (1954) (Brown 1) (*overruling Plessy* v. *Ferguson*, 163 U.S. 537 (1896); striking down 58 years of "separate but equal" doctrine); a*ccord, Bolling v. Sharpe*, 347 U.S. 497 (19543 Rotunda, TREATISE ON CONSTITUTIONAL LAW § 23.33, p. 512 (1986). Moreover, where the importance of the question is great, and touches sensitive issues that need to be resolved, this Court has not allowed the fact that some issues were not properly addressed in the courts below to prevent further argument on the issues omitted so that the continuing controversy could be settled. Brown I, 347 U.S., at 489, 496;

Brown v. Board of Education., 349 U.S. 294, 298 (1955) (*Brown II*) (for remedy).

The questions presented herein touch sensitive issues that need to be resolved. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the court noted that Roe[4] stood at the intersection of two lines of decisions. One, typified by *Griswold v. Connecticut*, 381 U.S. 479 (1965), are those cases which found a right to privacy in which the state had no right to interfere with personal choices regarding sex,[5] family, and whether to bear and beget children. *Casey*, 505 U.S., at 857. The other line of cases found there exists a certain individual autonomy that limited governmental power regarding medication and the right to die, which supports the *Roe* conclusion. *Ibid.* The *Casey* plurality suggests that *Roe* might be *sui generis*, i.e., one of a kind, but since there had been no erosion of its central premise, noting the change in membership and squabbling among the justices, even if the court were to assume error by *Roe*, "it only went to the strength of the state interest in fetal protection, not to the rec-

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4 Interestingly, the Roe citations in support of a woman's right to privacy simply do not support an absolute right to privacy. Indeed, in what appears now to be a false first step, the High Court observed the right to privacy was first noted in 1891, citing a case that had nothing to do with a constitutional issue. *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *but cf, Sibbach v. Wilson & Co.*, 312 U.S. 1, 11 (1940). *Sibbach* teaches that *Botsford* was not a substantive rule of constitutional law of privacy, but rather, one of statutory construction. In 1891, there was no authority for a physical examination of a plaintiff, a legislative omission cured by the Federal Rules of Civil Procedure, Rule 35, which was no affront to privacy because the plaintiff voluntarily advanced the issue by bringing suit.

5 The court has not been consistent with respect to sex. For instance, in *Bennis v. Michigan*, 516 U. S. 442 (1996), where a man engaged in sexual intercourse with a prostitute in the family vehicle, was caught, the vehicle was subject to forfeiture, and the wife of the man could not redeem her community property interest, notwithstanding she had no knowledge of the act. No case has held that a woman, based on her right to privacy, can do whatever she wishes with her body. *A fortiori*, if "unborn children" are persons in the constitutional sense, it is not possible that a woman has an absolute right to take the child's life.

ognition by the Constitution of the woman's liberty." *Casey,* 505 U.S., at 858-59. The soundness of Roe, said the *Casey* Court, was apparent from a consideration of the alternative. "If indeed, the woman's interest in deciding whether to bear and beget a child had not been recognized in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." *Casey,* 505 U.S., at 860. After a review of *stare decisis,*[6] the lack of anything new regarding the status of unborn children, and in view of widespread reliance, *Casey* abandoned *Roe's* trimester periods, and affirmed both women's rights and the "State's interest in protecting human potentiality" after viability, provided there was no undue burden on a woman's choice. *Ibid.*

Casey begs important questions. The central issue is not whether a woman has a right to decide whether to beget children; of course she does. And of course there is no issue as to termination of a pregnancy; all pregnancies will terminate at the end of term, by natural birth, caesarian section, or otherwise. The issue *is:* whether a woman has the right to choose to terminate the life of "unborn children" once begot where the life and health of the mother is not at risk. The *Roe* Court reached the result it did because, it said, Texas had failed to demonstrate where in the Constitution "unborn children" were Constitutional persons. 410 U.S., at 157-59.[7] *Casey* perpetuates the *Roe error* on the basis there has been no development in constitutional theory that undermines the *Roe*

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[6] Justice O'Connor conceded there was an erosion of support by the justices as to the continued validity of Roe.

[7] A reading of the Petition, Response, and Briefs by the parties and *Amicii in Roe* shows the primary focus was on the term person as found in the 5th and 14th Amendments. 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES.

premise. Neither opinion addresses the term "Posterity"[8] in the Preamble, nor its meaning. Furthermore, there has been a growing recognition that this Honorable Court erred. COMMENTS, TO BE AND NOT TO BE: INCONSISTENCIES IN *THE LAW* REGARDING THE LEGAL STATUS OF THE UNBORN FETUS, 71 Temple Law Review 963, 994 (1998) (hereinafter, To Be and Not to Be.); Notes, Fourteenth Amendment Personhood; Fact or Fiction?, 73 St. John's Law Review 495, 530-40 (1999) (hereinafter, *Fourteenth Amendment* Personhood); LYNCH I, *supra*; LYNCH II, *supra.*[9]

This court can judicially notice the impact on the judiciary by abortion cases, and that this Court's opinions have been heavily criticized as being unsound in principle and unworkable in practice. *To Be and Not to Be;* Fourteenth Amendment Personhood, supra ("our judiciary is dishonest in its treatment of fetuses"); Lynch I and II, *supra.* Similarly, it is well known that the abortion controversy has led to disorder in the streets throughout the country.[10] Moreover, beginning with *Webster v. Reproductive Health Services,* 492 U.S. 490, 518-519 (1989) (Rehnquist, Ch. J.), this Court has increasingly found "*Roe* to be unsound in principle and unworkable in practice." The most critical voice of this court's position came from this Honorable Court's Justice Scalia in dissent in *Stenberg v. Carhart,* 530 U.S. 914, 953 (2000).[11] In

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[8] Douglas, J., mentioned "liberty," but that was hardly an exposition on the meaning of "Posterity" in the Preamble.

[9] Notwithstanding widespread availability in print, and on the web, no article has ever purported to demonstrate the unsoundness of the approach taken in either Lynch I or Lynch II.

[10] It is not suggested that disorder is a reason for overruling *Roe.* The reason is "unborn children" are persons who are present members of "Posterity" in the Preamble of the Constitution.

[11] "The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from

fact, a proper reading of the Preamble *in pari materia* with the body of the Constitution shows that:

A person is created at conception. Preamble.
A person becomes a citizen at birth. 14th Amend, § 1.
A person can vote at age 18. 26th Amend, § 1.

Congress has not been silent. In 2002, it adopted definitions for "person," "human being," "child," and "individual" as including "born-alive infants." 1 U.S.C., § 8.[12] Section 8 goes beyond mere definition to recognize and preserve the common law rights[13] of "any member of the species homo sapiens at any point prior to being "born-alive"" as defined within that section. Id, subsection (c). The Congress has also adopted Partial Birth Abortion Act. 18 U.S.C., § 1351, Public Law 108-105 (2003), App., p. A7ff.

Thus, this Court should now recognize, in light of the above, that this Court has retreated from *Roe v.*

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simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd."

12 Sec. 8. "Person", "human being", "child", and "individual" as including born-alive infant

"(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

"(b) As used in this section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

"(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being "born alive" as defined in this section." Added Pub. L. 107-207, Sec. 2(a), Aug. 5, 2002, 116 Stat. 926.)

13 1 Blackstone, Commentaries on the Law of England, p. 126; Appendix , p. A6: "An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. ...." Id, p. 126. Appendix, p. A6.

Wade, 410 U.S. 113 (1973), and in light of the arguments to follow, should *overrule Roe.*

III.

IT IS BECOMING INCREASINGLY CLEAR THAT THE "UNBORN CHILDREN" ARE PRESENT MEMBERS OF "POSTERITY"

Neither the 5th Amendment nor the 14th Amendment defines personhood. The 14th Amendment only defines citizenship.[14] In other contexts, this Honorable Court has held that aliens,[15] and artificial persons[16] are persons entitled to Constitutional protection.[17] Not to recognize the "unborn children" as persons is therefore an anomaly.[18] As "Person," is used without qualification, the most logical place to look for meaning is the Preamble,[19] because while its purpose

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14 "All persons born or naturalized in the United States, and subject to the jurisdiction thereof ..."

15 *E.g., Hampton v. Mow Sun Wang*, 426 U.S. 88 (1976); Const., Art. VI, Treaty Clause; McKechnie, *Magna Carta*, Art. 41 (Aliens).

16 *See, Chicago B. & Q. R.R. Co. v. Iowa*, 94 U.S. 155 (1877); *E.g., Land v. Dollar*, 330 U.S. 731 (1974) (*Replevin*; Stock taken under color of federal law).

17 In virtually every context outside the abortion debate, the unborn are recognized as a person. *See,* Strahan, *Legal Protection of the Unborn Child Outside the Context of Induced Abortion*, 11 Association for Interdisciplinary Research in Values and Social Change (March/April 1997); *Civil Rights – Fetus as a Person*, 64 ALR Fed 886; Wasserstorm, *Homicide Based on Killing of Unborn Child*, 64 ALR5th 671; Wakefield, *Unborn Child as Insured or Injured Person Within Meaning of Insurance Policy*, 15 ALR4th 548.

18 At common law, the unborn were recognized as a person with substantial rights. 1 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Chapter 1, p. 126; Appendix, p. A6. *See also infra*, footnote 29.

19 The first record that a sovereign rules with the consent of the governed appears to be I Sam. 16, II Sam. 5, 9-20, 1 Kings 1-2. When David's father died, he ruled over the seven tribes of Judah for seven years. Then the elders of Israel met with David at Hebron, and they made a contract for David to rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral

is not to create rights,[20] it does define for whom the rights were created.[21]

The Preamble. reads:

> "We, the People of the United States, in Order; to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and **secure the Blessings of Liberty to** ourselves and **our Posterity**, do ordain and establish this Constitution for the United States of America." Appendix, p. A6.

The words "People of the United States" and "citizens" are synonymous terms.[22] The Preamble creates two classes of sovereignty, "ourselves" and "our Posterity."[23] Its purpose appears to be to include "Posterity[24] on an equal footing with, and having the same rights as, "ourselves" as evidenced by the parallel structure of the phrase. Therefore, 'Posterity" as to those who are lives in being, is synonymous, if not with "citizenship,"[25] surely "personhood."[26] This understanding is consistent with an understanding of the meaning of "Posterity" in 1787.[27] In 1644, Milton argued that the, "Parliament could no more censure the issue of the mind than it could the issue of the womb."[28] At common law, certain members of future generations, "unborn children",[29] were lives in being for the purposes of the Rule Against Perpetuities.[30] Moreover, prenatal injuries were to a limited extent recognized at Common Law,[31] and it does not appear that tort actions for the injuries were barred.[32] Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with powers of alienation, a concept clearly inconsistent with the concept of "unalienable rights" in the Declaration

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acknowledgments of human rights. The *Magna Carta, infra,* appears to be the first written document executed by both the sovereign and its subjects. The Constitution abolished traditional sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures.

[20] *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857); *Cruikshank, supra*, 92 U.S. (2 Otto) 542, 549. The 13th & 14th Amendments do not overrule *Scott*, but only remove the limitations found in Article I, thus enlarging the class of persons who are citizens.

[21] See, footnote 20, supra

[22] See, footnote 20, supra

[23] Lynch I , etc, supra, at page 1.

[24] "Posterity" is capitalized in the original. As a noun is capitalized only if it identified a particular person, place, or thing, it implies the framers considered the word important

[25] See footnote 9, *ante*. It is probably more accurate to say the conceived "unborn children" are persons who become a naturalized citizen (§ I, 14th Amendment), except that the right to vote comes at age 18. (26th Amendment)

[26] Supra, footnotes 20 & 25, and page 10, after "*pari materia.*"

[27] Lynch I, , etc. supra, at page 12.

[28] Milton, AREOPAGITICA (1644).

[29] Ante at footnote18; Aristotle, Politics, VII, I335b, 24-26; Aquinas, Summa Theologiæ, 1, q. 76, a. 5 and q. 118; Noonan, CONTRACEPTION, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy against persons causing a miscarriage. Exodus 21:22. It is not repugnant to the 1st Amendment Establishment Clause merely because civil law corresponds to the tenets of some religions. *E.g., Witters v. Washington* Dept of Social Svcs for the Blind, 474 U.S. 481 (1986).

[30] Gray, THE RULE AGAINST PERPETUITIES (4th Ed.); *Alamo School Dist. v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

[31] "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and die by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them. Lord Coke, repeated by Blackstone, at Book IV, p. 198. His reasoning may have been influenced by (1) "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." Magna Carta (1215), Art. 54. As her unborn child was not her husband, obviously, there was a failure of evidence. (2) Medical knowledge as to unborn children was quite primitive when compared to modern medical knowledge.

[32] *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960); *McIntosh v. Dill, supra*, 205 P. 917 (1922)); Halsbury's Laws of England (1st Ed, 1911) Infants §§ 132, 135. And it appears that at a minimum, these common law rights were intended by Congress to be preserved. 1 U.S.C., § 8(c) , Appendix, p. A7.

of Independence[33] and the concept of an "indestructible and perpetual union,"[34] whereas if construed as a fee tail,[35] it would be consistent with an intent to create "unalienable rights" and a "perpetual union,"[36] for the protection of future generations, including the "unborn children".

The Constitution was submitted to the People for ratification.[37] Implicit in the Preamble is the concept that the Constitution is to be a social contract[38] wherein society promises the individual unalienable rights, in return for which the individual promises to

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33 "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that Governments are instituted among Men, deriving their just powers from the consent of the governed, ..." American Declaration of Independence, § 2; Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY.

34 *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872) (On Preamble.)

35 *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409 (1900); *Haward* v. Howe, 12 Gray (Mass.) 49 (1858); *Gannon* v. *Athright*, 183 Mo. 238, 81 S.W. 1162 (1904); *Kay v. Scates*, 37 Pa 31(1860); *Larew v. Larew*, 146 Va. 134, 135 S.E. 819 (1926); 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf., Barber v. Pittsburgh*, F.W. & C.R. Co., 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, aff'md 222 U.S. 16 (1911), (recognizing by *dictum* common law rule). The Constitution concerns estates and interests in land. Art. I, Sec. 8, cl. 17 (District of Columbia; Places purchased); Art. III, Sec. 3, cl. 2 (forfeitures); Art. IV, Sec. 2, cl. I (privileges and immunities), Sec. 3, cl. 2 (property of the United States); Amendment III (Quartering of soldiers); Amendment IV (Secure in . . . Houses); Amendment V (nor be deprived of. . . property. . . nor shall private property be taken. . . .")

36 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf., Barber v. Pittsburgh*, F.W. & C.R. Co., 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, aff'md 222 U.S. 16 (1911) (Recognized by dictum common law rule).

37 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196,209, 565, 582, 590,651; 3 Rotunda, op cit., p. 663, note 1.

38 E.g., Hobbes, LEVIATAN (1651); Locke, SECOND TREATISE OF GOVERNMENT (1690); Laqueur, THE HUMAN RIGHTS READER (1979).

conform to the laws of society that do not derogate[39] from unalienable rights. Mutual promises have always been considered sufficient consideration for enforceability.[40] As persons under the age of Capacity[41] could not consent,[42] it appears the framers intended adults to be of the class "ourselves," and all others, including "unborn children", of the class "Posterity."[43]

Taking the approach that "unborn children" are present members of "Posterity" answers a number of theoretical problems. *Casey, supra*, 505 U.S. at 860. (O'Connor, J.) First, it is the development of constitutional theory recognizing there is not just one right, or more precisely - life, at stake, but two, the mother's, a member of "ourselves," and her "unborn child", a present member of "Posterity." Second, it supports the proposition the State cannot force women to terminate pregnancy or engage in eugenics, because her "unborn child" is a person entitled to protection. Third, it sets a standard that termination of a pregnancy occurs as a result of natural birth, or based on necessary medical intervention for the preservation of both lives, if possible. Fourth, it assures a woman's right to medical intervention to preserve both lives, if possible, without undue state influence. Fifth, it takes the courts out of the quagmire of trying to guess when "viable" occurs. With conception, there is no guesswork. Finally, it does justice by respecting the Constitutional guarantee to protect human life.

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39 Verdross, *Forbidden Treaties In International Law*, 31 AJIL 571 (1937); Id, *Jus Dispositivum & Jus Cogens In International Law*, 60 AJIL. 55 (1966).

40 Chitty on Contracts (23rd Ed, 1968) 134; Restatement, Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed. Raym., 909 (1703)(English Reports).

41 "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State account of age." 26th Amend, § 2.

42 Chitty on Contracts, op. cit..

43 2 Stephens Commentaries 342 (1841) .

IV.

SINCE ROE V. WADE, CONGRESS, WITH PLENARY CONTROL OVER NATURALIZATION, HAS APPARENTLY EXTENDED CITIZENSHIP STATUS TO THE "UNBORN CHILDREN", WHICH THIS COURT SHOULD ACCORD DEFERENTIAL RESPECT

The U.S. Supreme Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure. *Carlisle v. United States*, 517 U.S. 416, 426 (1996).[44] While Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, *e.g., Palermo v. United States*, 360 U.S. 343, 345-348 (1959), it may not supersede this Court's decisions interpreting and applying the Constitution. *See generally, City of Boerne v. Flores*, 521 U.S. 507, 517-521, *Dickerson v. U.S.*, 530 U.S. 428 (2000).

This case comes to the courts in a materially different posture than Dickerson. There, Congress attempted to overrule the Miranda decision and redefine a defendant's rights under the 5th Amendment in a manner inconsistent with an opinion of this Court.

In this case, Congress has, by its authority under Article I, § 8, clause 4, extended protection to a class of persons apparently recognized as members of Posterity, in the absence of any opinion from this Court defining the term Posterity as used in the Preamble.

It is conceded that that both Art. I, § 8, clause 18, and the 14th Amendment, § 5, are "a positive grant of legislative power" to Congress to "enact necessary and proper legislation to carry out that objective." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *Wayman v. Southhard*, 23 U.S. (10 Wheat.) 1 (1825). In *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880) and *Boerne v. P.F. Flores*, 594 U.S. 511, 517 (1997), this Court explained the scope of Congress' § 5 power in the following broad terms:[45]

> "Whatever legislation is appropriate ... to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws ... denial or invasion, if not prohibited, is ... within the domain of congressional power."

Congress has plenary power over naturalization. Art. I, § 8, clause 4. Naturalization has been defined as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 15, 162 (1989). Given the powers granted under Art. I, § 8, clause 18 and § 5 of the 14th Amendment, and the words in the Preamble, "to secure the blessing of liberty to ourselves and our Posterity" it would appear, *see infra*, that Congress could "adopt [Posterity, the conceived unborn,] and cloth[e them] with the privileges of a ... citizen," until they are born.

Given the right of Congress to "secure the blessings of liberty for ourselves and our Posterity", and Clause 4 power to regulate naturalization, this court should grant deference to the Congressional authority to abolish what it considers contrary to the principles found in the Constitution for the protection of human life, as "unborn children" are members of "Posterity."

V.

THE GOVERNMENT HAS A RIGHT TO PROTECT THE "UNBORN CHILDREN"

The Constitution Provides, in relevant part:

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[44] Once a federal claim [or defense] is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899).

[45] It is also true that "[a]s broad as the congressional enforcement power is, it is not unlimited." *Oregon* v. *Mitchell, supra*, at 128 (opinion of Black, J.); E.g., *Boerne v. P.F. Flores*, [594] U.S. 511, 518 (1997) (Opinion by Kennedy, J.).

"No person shall be ... deprived of life ... without due process of law." U.S. Cons., 5th Amend.

No American government may utilize tax money to take life without due process of law.[46] *E.g., Flash v. Cohen*, 392 U.S. 83 (1968). Assuming, *arguendo*, that "unborn children" are present members of "Posterity," they have a right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill, supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England, Infants §* 132, 135 (1st ed, 1911), to be heard on whether their lives should be terminated. *See generally, Midlane v. Central Hanover Bank*, 339 U.S. 706 (1950); *Furman v. Georgia*, 408 U.S. 238 (1972), and it progeny; *Cruikshank, supra*, 92 U.S. (2 Otto), at 549; I Blackstone, Commentaries, etc., p. 126, App, p. B1.

On the side of the mother, a member of "ourselves", most, if not all, states have enacted legislation to protect young women and girls from unwanted pregnancy. Appendix, p. . The decision below undermines the ability of the several states to enforce those laws because by the secrecy, and hiding of the facts from the parents, sexual predators are likely to escape responsibility for their conduct.

As to "Unborn children", members of "posterity", they have all of the characteristics of life.[47] See generally, *To be and not to be*, supra; Fourteenth Amendment Personhood, supra, 72 St. John's L.R., at 534-39; Lynch I, supra; Lynch II, supra. Whether it can be ascertained at any point in time that "unborn children" are human is absurd;[48] if the parents are human they will be human.[49]

In the case of the partially born children, the case is even more compelling. The findings of Congress (Appendix, A8 – A21.) demonstrate the absurdity of the proposition that a partial birth abortion somehow protects the health of the mother. Indeed, the sole difference between a birth process in which the child survives, and the partial birth abortion, is that in the later the birthing process is interrupted for the sole purpose of killing the child, before allowing the process to be completed.

Given the obligation to ensure life is not taken without due process of law, and the dangers inherent in allowing sexual predators escape responsibility, it appears that the state has a legitimate interest in denying an absolute right to take the life of unborn or partially born children. The citizens of every state appear to have a legitimate interest in ensuring safeguards so that neither the mother nor the "unborn children" become victims of sexual abuse or genocide. (E.g., *International Convention on the Prevention and Punishment of the Crime of Genocide*, Congressional Digest, December 1984; U.S. Const., Art. VI, cl. 2

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[46] A state has the obligation to provide police protection for its citizens at home. (Verdross, *Forbidden Treaties International Law*, 31 AJIL 571 (1937); Verdross, *Jus Dispositivum & Jut Cogens in International. Law*, 60 AJIL 55(1966)). Protecting an individual through due process in American jurisprudence is derived from the *Magna Carta* (1215) . *Murray's Lessee v. Hoboken Land & Improvement* Co., 59 U.S. (18 How.) 272 (1856). McKechnie, *Magna* Carta; the Great Charter of King John. McKechnie is the recognized scholar on the *Magna Carta*. 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw. I *(Magna* Carta)(1297), p. 14, Notes, ¶ 2.

[47] Case & Stairs, Biology; OBSERVATION & CONCEPT (1971):, p. 110, excretion, pp. 122, 141, 143, 149-150; ingestion, pp. 70, 80; respiration, pp. 8, 51, 64, 77; irritation, pp. 267, 329, 330; reproduction, pp. 122, 163-165,298-299,327,329. A zygote has an individual developing life that is viable in *utero*, in contradistinction to the ovum and sperm, which are not. Id, pp. 324-327. See fn 48.

[48] See, *Stenberg v. Carhart*, supra, 530 U.S., at 953.

[49] The fact that the zygote is not viable extrauterine does not negate the existence of life. All life is environmentally dependent. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to cut the cord to test whether or not there was viability; such a proposition is absurd. Similarly, a fetus securely within the womb will die if there is an abruption of the placenta. Jacobs, et al, MDs, OBSTETRICS AND GYNECOLOGY, FAMILY HEALTH & MEDICAL GUIDE (1979), page 93.

(treaties).[50] Accordingly, any law to the contrary would be void as repugnant to the doctrine of *jus cogens*.

In view of the foregoing, and the right of the government to "clothe [persons] with the privileges of citizenship", this court should give deference to the Congressional legislation regarding personhood in view of the plain language of the Preamble which appears to include the unborn as members of sovereignty, and *overrule Roe and its progeny* prospectively.

CONCLUSION

Based upon the foregoing, this Court should *overrule Roe v. Wade,* 410 U.S. 113 (1973), and its progeny as inconsistent with the plain meaning of "Posterity" in the Preamble, reverse and remand for further proceedings not inconsistent with this court's views.

Dated: 7/29/2005

RESPECTFULLY SUBMITTED,

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50 Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d Amend. (Quartering of soldiers), and 4th Amend (search and seizure); *Katz v. United* States, 389 U.S. 347 (1967), and its progeny. But the right to privacy is not absolute. See footnote 5, *supra*.

APPENDIX

EXCERPTS FROM FARRAND, MAX, THE CONSTITUTIONAL DEBATES*

[129]

COMMITTEE OF DETAIL, IV

* **

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

****

VI

We the People of *(and)* the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

1.

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[163]

COMMITTEE OF DETAIL, IX

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* * Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's, which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says, "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

IX

[same as previously reported]

1.

****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

*****

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: *****

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

[196]

Tuesday MADISON

MADISON

Teusday August 7th. In Convention

****

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

[209]

Tuesday MCHENRY Augt 7

MCHENRY

Augt. 7.

****

The preamble or caption and the 1. and 2. article passed without debate ....

****

[565]

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

****

[590]

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form a more perfect union, to establish justice. insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

****

[604]

****

THURSDAY, SEPTEMBER 13,1787.

JOURNAL

Thursday September 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled, and

that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification.

[604]

[To postpoine the report respecting the 22nd and 23rd Ayes -- 9; noes -- 1.]

****

To strike out the word "to" before establish justice Ayes—8; Noes---2.]

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

Monday September 17, 1787.

Detail of Ayes and Noes

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President
	[567]	[568]	[569]
New Hampshire	Aye	Aye	aye
Massachusetts	Aye	Aye	aye
Rhode Island	Aye	Aye	aye
Connecticut	Aye	Aye	aye
New York	Aye	Aye	aye
New Jersey	Aye	Aye	aye
Pennsylvania	Aye	Aye	aye
Delaware	Aye	aye	aye
Maryland	Aye	aye	no
Virginia	Aye	aye	aye
North Carolina	Aye	aye	aye
South Carolina	Aye	dd	aye
Georgia	Aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ...

****

[643]

--- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

****

[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

****

[651]

THE CONSTITUTION

OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

****

1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND

atrocious a light, though it remains a very heinous miſdemeſnor[r].

AN infant *in ventre ſa mere*, or in the mother's womb, is ſuppoſed in law to be born for many purpoſes. It is capable of having a legacy, or a ſurrender of a copyhold eſtate made to it. It may have a guardian aſſigned to it[s]; and it is enabled to have an eſtate limited to it's uſe, and to take afterwards by ſuch limitation, as if it were then actually born[t]. And in this point the civil law agrees with ours[u].

2. A MAN's limbs, (by which for the preſent we only underſtand thoſe members which may be uſeful to him in fight, and the loſs of which only amounts to maybem by the common law) are alſo the gift of the wiſe creator; to enable man to protect himſelf from external injuries in a ſtate of nature. To theſe therefore he has a natural inherent right; and they cannot be wantonly deſtroyed or diſabled without a manifeſt breach of civil liberty.

BOTH the life and limbs of a man are of ſuch high value, in the eſtimation of the law of England, that it pardons even homicide if committed *ſe defendendo*, or in order to preſerve them. For whatever is done by a man, to ſave either life or member, is looked upon as done upon the higheſt neceſſity and compulſion. Therefore if a man through fear of death or *maybem* is prevailed upon to execute a deed, or do any other legal act; theſe, though accompanied with all other the requiſite ſolemnities, are totally void in law, if forced upon him by a well-grounded apprehenſion of loſing his life, or even his limbs, in caſe of his non-compliance[v]. And the fame is alſo a ſufficient excuſe for the commiſſion of many miſdemeſnors, as will appear in the fourth book.

[r] 3 Inſt. 50.
[s] Stat. 12 Car. II. c. 24.
[t] Stat. 10 & 11 W. III. c. 16.
[u] *Vid. ff. de ſtatu hom.* [illegible]
[v] *Et si vero ſolus, in jure civili nulliger-* [illegible] *nec ſi servus coactus aquavit. Ff.* 1. 5. 26.
[w] 3 Inſt. 483.

The

PARTIAL-BIRTH ABORTION BAN ACT OF 2003

PUBLIC LAW 108-105, SEE PAGE 117 STAT. 1201

[3 US CODE CONG & ADMIN NEWS]

DATES OF CONSIDERATION AND PASSAGE

House: June 4, 2003

Senate: March 10, 11, 12, 13, 2003

Cong. **Record Vol. 148** (2003)

House Conference Report No. 108-288, September 30, 2003

[To accompany S. 3]

The House Conference Report is set out below.

HOUSE CONFERENCE REPORT 108-288

[{HCR,} page 1]

.....

[{HCR,} page 9]

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3), to prohibit the procedure commonly known as partial-birth abortion, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment struck all the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment that is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

Section 1: Short title

Section 1 of the conference report is identical to Section 1 of the House amendment and Section 1 of the Senate bill. Section 1 states that the short title of this measure is the "Partial-Birth Abortion Ban Act of 2003."

[U.S. Cong, Admin & Leg News Service, p 1273]

Section 2. Findings

Paragraph (1) in Section 2 of the conference report is substantially similar, with clarifications, to paragraph (1) in Section 2 of the House passed bill and paragraph (1) in Section 2 of the Senate passed bill. In paragraph (1) Congress finds that a moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion—an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or, any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the child's brains) that the person knows will kill the partially delivered living infant, performs this act, and then completes delivery of the

dead infant—is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

Paragraph (2) in Section 2 of the conference report is identical to paragraph (2) in Section 2 of the House amendment and paragraph (2) in Section 2 of the Senate bill. In paragraph (2), Congress finds that rather than being an abortion procedure that is embraced by the medical community, particularly among physicians

[{HCR,} page 10]

who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives. Congress also finds that as a result, at least 27 States banned the procedure as did the United States Congress which voted to ban the procedure during the 104th, 105th, and 106th Congresses.

Paragraph (3) in Section 2 of the conference report is identical to paragraph (3) in Section 2 of the House amendment and paragraph (3) in Section 2 of the Senate bill. In paragraph (3), Congress finds that in Stenberg v. Carhart, 530 U.S. 914, 932 (2000), the United Stales Supreme Court, which did not have in front of it the extensive factual record compiled by Congress, construed the record in that case to support "he proposition that in some circumstances, [partial-birth abortion] would be the safest procedure" for pregnant women who wish to undergo an abortion. Congress also finds that as a result of having reached this conclusion the Court struck down the State of Nebraska's ban on partial-birth abortion procedures, concluding that it failed to include an exception for partial-birth abortions deemed necessary to preserve the "health" of the mother, and placed an "undue burden" on women seeking abortions.

Paragraph (4) in Section 2 of the conference report is identical to paragraph (4) in Section 2 of the House amendment and paragraph (4) in Section 2 of the Senate bill. In paragraph (4), Congress finds that the Court's decision was based on the Federal district court's factual findings that the partial-birth abortion procedure was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures—findings which are contradicted by Congress's extensive factual record presented and compiled during the 104th, 105th, 107th, and 108th Congresses.

Paragraph (5) in Section 2 of the conference report is substantially similar, with clarifications, to paragraph (5) in Section 2 of the House passed bill and paragraph (5) in

[U.S. Cong, Admin & Leg News Service, p 1274]

Section 2 of the Senate passed bill. In paragraph (5) Congress finds that substantial evidence presented at the Stenberg trial, and the overwhelming evidence that was presented and compiled at extensive Congressional hearings, much of which was compiled after the district court hearing in Stenberg, and thus not included in the Stenberg trial record, demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed, and is outside of the standard of medical care.

Paragraph (6) in Section 2 of the conference report is identical to paragraph (6) in Section 2 of the House amendment and paragraph (6) in Section 2 of the Senate bill. In paragraph (6), Congress finds that despite the dearth of evidence in the Stenberg trial court record supporting the district court's findings, the United States Court of Appeals for the Eighth Circuit and the Supreme Court refused to set aside the district court's factual findings because, under the applicable standard of appellate review, they were not

"clearly erroneous." Congress also finds that a finding of fact is clearly erroneous "when although there is evidence to support it,

[{HCR,} page 11]

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" Anderson v. City of Bessemer, North Carolina, 470 U.S. 564, 573 (1985). Congress also finds that under this standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Id. at 574.

Paragraph (7) in Section 2 of the conference report is identical to paragraph (7) in Section 2 of the House amendment and paragraph (7) in Section 2 of the Senate bill. In paragraph (7), Congress finds that in *Stenberg,* the United States Supreme Court was required to accept the very questionable findings issued by the district court judge—the effect of which was to render null and void the reasoned factual findings and policy determinations of the United States Congress and at least 27 Stale legislatures.

Paragraph (8) in Section 2 of the conference report is identical to paragraph (8) in Section 2 of the House amendment and paragraph (8) in Section 2 of the Senate bill. In paragraph (8), Congress finds that under well-settled Supreme Court jurisprudence, it is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg* under the "clearly erroneous" standard. Congress also finds that it is entitled to reach its own factual findings—findings that the Supreme Court accords great deference—and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and

draws reasonable inferences based upon substantial evidence.

Paragraph (9) in Section 2 of the conference report is identical to paragraph (9) in Section 2 of the House amendment and paragraph (9) in Section 2 of the Senate bill. In paragraph (9), Congress finds that in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Supreme Court articulated its highly deferential review of Congressional factual findings when it addressed the constitutionality of section 4(e) of the Voting Rights Act of 1965. Regarding Congress' factual determination that section 4(e) would assist the Puerto Rican community in "gaining nondiscriminatory treatment in public services," the Court stated that "[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. * * * It is not for us to review the

[U.S. Cong, Admin & Leg News Service, p 1275]

congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support section 4(e) in the application in question in this case." Id. at 653.

Paragraph (10) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (10) in Section 2 of the House amendment and paragraph (10) in Section 2 of the Senate bill. In paragraph (10), Congress finds that Katzenbach's highly deferential review of Congress's factual conclusions was relied upon by the United States District Court for the District of Columbia when it upheld the "bail-out" provisions of the Voting Rights Act of 1965, (42 U.S.C. 1973c), stating that "congressional fact finding, to which we are inclined to pay great deference, strengthens the inference that, in those jurisdictions covered by the

[{HCR,} page 12]

Act, state actions discriminatory in effect are discriminatory in purpose." *City of Rome, Georgia* v. *U.S.*, 472 F. Supp. 221 (D. D.C. 1979), affd, 446 U.S. 156 (1980). "

Paragraph (11) in Section 2 of the conference report is identical to paragraph (11) in Section 2 of the House amendment and paragraph (11) in Section 2 of the Senate bill. In paragraph (11), Congress finds that the Court continued its practice of deferring to congressional factual findings in reviewing the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. See *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, 512 U.S. 622 (1994) *(Turner I)* and *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, 520 U.S. 180 (1997) *(Turner If)*. Congress finds that at issue in the *Turner* cases was Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be "seriously jeopardized." Congress finds that the *Turner I* Court recognized that as an institution, "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here." 512 U.S. at 665-66. Although the Court recognized that "the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law,' "its "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo. or to replace Congress' factual predictions with our own. Rather, it is to assure that in formulating its judgments Congress has drawn reasonable inferences based on substantial evidence." Id. at 666.

Paragraph (12) in Section 2 of the conference report is identical to paragraph (12) in Section 2 of the House amendment and paragraph (12) in Section 2 of

the Senate bill. In paragraph (12), Congress finds that three years later in *Turner II*, the Court upheld the "must-carry" provisions based upon Congress' findings, stating the Court's "sole obligation is 'to assure that, in formulating its judgments. Congress has drawn reasonable inferences based on substantial evidence.'" 520 U.S. at 195. Congress finds that, citing its ruling in *Turner I*, the Court reiterated that "[w]e owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions," Id. at 195, and added that it "owe[d] Congress' findings an additional measure of deference out *of* respect for its authority to exercise the legislative power." Id. at 196.

[U.S. Cong, Admin & Leg News Service, p 1276]

Paragraph (13) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (13) in Section 2 of the House amendment and paragraph (13) in Section 2 of the Senate bill. In paragraph (13), Congress finds that there exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-birth abortion is not required to contain a "health" exception, because the facts demonstrate that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care. Congress also finds

[{HCR,} page 13]

that it has been informed by extensive hearings held during the 104th, 105th, 107th, and 108th Congresses and passed a ban on partial-birth abortion in the 104th, 105th, and 106th Congresses. Congress finds that these findings reflect its very informed judgment that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a

woman's health,' and lies outside the standard of medical care, and should, therefore, be banned.

Paragraph (14) in Section 2 of the conference report is substantively identical, with technical clarifications, to paragraph (14) in Section 2 of the House amendment and paragraph (14) in Section 2 of the Senate bill. In paragraph (14), Congress, pursuant to the substantial and credible testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses, lists its declarations regarding the partial-birth abortion procedure:

Paragraph (14)(A) in Section 2 of the conference report is identical to paragraph (14)(A) in Section 2 of the House amendment and paragraph (14)(A) in Section 2 of the Senate bill. In paragraph (14)(A), Congress declares that a partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. Those risks include, among other things: an increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position, a procedure which, according to a leading obstetrics textbook, "there are very few, if any, indications for * * * other than for delivery of a second twin"; and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death. Therefore, Congress concludes that those who express the view that partial-birth abortion may be a safer method of abortion in some circumstances have never examined the severe risks of the procedure to the health of the

mother and have not demonstrated that this procedure is a safe, medically accepted, standard of care.

Paragraph (14)(B) in Section 2 of the conference report is identical to paragraph (14)(B) in Section 2 of the House amendment and paragraph (14)(B) in Section 2 of the Senate bill. In paragraph (14)(B), Congress declares that there is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. Congress also declares that no controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Congress further declares that there have

[U.S. Cong, Admin & Leg News Service, p 1277]

been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures. Congress also declares that unlike other more commonly used abortion procedures, there are currently no medical schools that provide instruction on abort-

[{HCR,} page 14]

ions that include the instruction in partial-birth abortions in their curriculum.

Paragraph (14)(C) in Section 2 of the conference report is identical to paragraph (14)(C) in Section 2 of the House amendment and paragraph (14)(C) in Section 2 of the Senate bill. In paragraph (14)(C), Congress declares that a prominent medical association has concluded that partial-birth abortion is "not an accepted medical practice," that it has "never been subject to even a minimal amount of the normal medical practice development," that "the relative advantages and disadvantages of the procedure in specific circumstances remain unknown," and that "there is no consensus among obstetricians about its use." The association has further noted that partial-birth abortion is broadly disfavored by both medical experts and

the public, is "ethically wrong," and "is never the only appropriate procedure."

Paragraph (14)(D) in Section 2 of the conference report is identical to paragraph (14)(D) in Section 2 of the House amendment and paragraph (14)(D) in Section 2 of the Senate bill. In paragraph (14)(D), Congress declares that those who espouse the view that partial-birth abortion "may" be the most appropriate abortion procedure for some women in "some" circumstances, such as the plaintiff in *Stenberg* v. *Carhart* and the experts who testified on his behalf, have failed to identify such circumstances and base their opinion on theoretical speculation, not actual evidence that demonstrates the relative safety of this abortion procedure.

Paragraph (14)(E) in Section 2 of the conference report is identical to paragraph (14)(E) in Section 2 of the House amendment and paragraph (14)(E) in Section 2 of the Senate bill. In paragraph (14)(E), Congress declares that the physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

Paragraph (14)(F) in Section 2 of the conference report is identical to paragraph (14)(F) in the House amendment and paragraph (14)(F) in the Senate bill. In paragraph (14)(F), Congress declares that a ban on the partial-birth abortion procedure will advance the health interests of pregnant women seeking to terminate a pregnancy.

Paragraph (14)(G) in Section 2 of the conference report is identical to paragraph (14)(G) in the House amendment and paragraph (14)(G) in the Senate bill. In paragraph (14)(G), Congress declares that in light of this overwhelming evidence, Congress and the States have a compelling interest in prohibiting partial-birth abortions. Congress also declares that in addition to promoting ma-

ternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

Paragraph (14)(H) in Section 2 of the conference report is identical to paragraph (14)(H) in the House amendment and (14)(H) in the Senate bill. In paragraph (14)(H), Congress declares that based upon *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), a governmental interest in protecting the life of a child during the delivery process arises, in part, by vir-

[U.S. Cong, Admin & Leg News, p 1278]

[{HCR,} page 15]

tue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. Congress further declares that this distinction was recognized in *Roe* when the Court noted, without comment that the Texas parturition statute, which prohibited one from killing a child "in a state of being born and before actual birth," was not under attack. Congress declares that this interest becomes compelling as the child emerges from the maternal body. Congress declares that a child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Congress declares that partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a "person." Partial birth gives the fetus an autonomy that is separate and distinct from that of the mother. Thus, the government has a heightened interest in protecting the life of the partially-born child.

Paragraph (14)(I) in Section 2 of the conference report is identical to paragraph (14)(I) in Section 2 of the House amendment and paragraph (14)(I) in Section 2 of the Senate bill. In paragraph (14)(I), Congress declares that the distinction between a partial-birth

abortion and other abortion methods has been recognized by the medical community, where a prominent medical association has recognized that partial-birth abortions are "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb." According to this medical association, the " 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body."

Paragraph (14)(J) in Section 2 of the conference report is identical to paragraph (14)(J) in Section 2 of the House amendment and paragraph (14)(J) in Section 2 of the Senate bill. In paragraph (14)(J), Congress declares that a partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. Congress further declares that a partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children—obstetricians who preserve and protect the life of the mother and the child—and instead uses those techniques to end the life of the partially-born child.

Paragraph (14)(K) in Section 2 of the conference report is identical to paragraph (14)(K) in Section 2 of the House amendment and paragraph (14)(K) in Section 2 of the Senate bill. In paragraph (14)(K), Congress declares that by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

Paragraph (14)(L) in Section 2 of the conference report is identical to paragraph (14)(L) in Section 2 of the House amendment and paragraph (14)(L) in Section 2 of the Senate bill. In paragraph (14)(L), Congress declares that the gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity

[U.S. Cong, Admin & Leg News, p 1279]

[{HCR,} page 16]

to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

Paragraph (14)(M) in Section 2 of the conference report is identical to paragraph (14)(M) in Section 2 of the House amendment and paragraph (14)(M) in Section 2 of the Senate bill. In paragraph (14)(M), Congress declares that the vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. Congress further declares that it is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Evidence compiled by Congress demonstrates that fetuses on whom in utero surgery is performed for medical reasons feel pain from needles and instruments and are provided anesthesia. Pain management is an important part of care provided to infants cared for in neonatal units who are of the same gestational ages as those subject to partial-birth abortion. Partial-birth abortion is an extremely painful procedure for the fetus and, during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.

Paragraph (14)(N) in Section 2 of the conference report is identical to paragraph (14)(N) in Section 2 of the House amendment and paragraph (14)(N) in Section 2 of the Senate bill. In paragraph (14)(N), Congress declares that implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Congress further declares that as a result it has a compelling interest in acting—indeed it must act—to prohibit this inhumane procedure.

Paragraph (14)(0) in Section 2 of the conference report is identical to paragraph (14)(0) in Section 2 of the House amendment and paragraph (14)(0) in Section 2 of the Senate bill. In paragraph (14)(0), Congress declares that for these reasons, it finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

Section 3. Prohibition on partial-birth abortions

Subsection (a) in Section 3 of the conference report is identical to subsection (a) in Section 3 of the House amendment and subsection (a) in Section 3 of the Senate bill. In subsection (a) of Section 3 Congress amends title 18 of the United States Code by inserting anew chapter 74 consisting of a new 18 U.S.C. 1531:

Subsection (a) of the new section 1531 contained in Section 3(a) of the conference report is identical to subsection (a) of the new section 1531 proposed in Section 3(a) of the House amendment and subsection (a) of the new section 1531 proposed in Section 3(a) of

[U.S. Cong, Admin & Leg News Service, p 1280]

STATE	AGE	Citation	Remarks
ALABAMA	16	Section 13A-6-62	Second Degree Rape
ALASKA	13	Sec. 11.41.434.	Sexual abuse of a minor in the first degree.
ARIZONA	18	13-1405, -1410 (age 15); -1417 (age 14).	Molestation of child; classification
ARKANSAS	14	5-14-103	Rape.
California	18		Unlawful sexual intercourse
COLORADO	15	18-3-402	Rape
CONNECTICUT	15	Sec. 53a-73a.	Sexual assault
DELAWARE	18	11-5-§ 768.	Unlawful sexual contact in the second degree; class G felony
DISTRICT OF COLUMBIA	16	DC CODE s 22-3001, 3009	Unlawful Sexual contact
FLORIDA	12	46-794-794.011, 794.05	Sexual battery.--
GEORGIA	16	16-6-5.	(Enticing child for indecent purposes.
HAWAII	16		Unlawful sex
IDAHO	18	18-6101	RAPE DEFINED.
ILLINOIS	17	Sec. 11-6.	Indecent solicitation of a child.
INDIANA	14	IC 35-42-3	Child molesting
IOWA	14	16-709- 702 & -709.1	Sexual abuse defined..

KANSAS	14	21-3502.	Rape
KENTUCKY	16	50.510.020	Lack of consent.
LOUISIANA	15	14: 43.1	Sexual battery
MAINE	14	17A-11-254 & -255,	§ 255 Unlawful sexual contact §254. Sexual abuse of minors
MARYLAND	14	3-3-304	Rape in the second degree.
MASSACHUSETTS	16	4-1-265-23	Rape and abuse of child
MICHIGAN	13	750.520b, 520c(a).	Criminal sexual conduct in the first degree; felony.
MINNESOTA	13	609.343 or .345	609.343 Criminal sexual conduct in the second degree.
MISSISSIPPI	14	97-3-65	Rape; carnal knowledge of child under fourteen years of age.
MISSOURI	14	566.032.	Statutory rape
MONTANA	16	45-5-501.	Definition of the term "without consent"
NEBRASKA	14	28- 319, 320.01, & 805	28-319 Sexual assault; first degree; penalty. † 28-320.01 Sexual assault of a child; penalties. † 28-805 Debauching a minor; penalty. †
NEVADA	16	NRS 200.364	Definitions "Statutory sexual seduction"

NEW HAMPSHIRE	13		632-A:2 Aggravated Felonious Sexual Assault.
NEW JERSEY	13	2C:14-2.	Sexual assault.
NEW MEXICO	13	30-9-11, -12 & -13.	Criminal sexual penetration. (2001)
NEW YORK	17	40.130.05	A person is deemed incapable of consent
NORTH CAROLINA	13	14-27.2, .4 & .7A	§ 14-27.2. First-degree rape. § 14-27.4. First-degree sexual offense. § 14-27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old.
NORTH DAKOTA	14	12.1-20-01, -03,	12.1-20-03. Gross sexual imposition.
OHIO	13	2907.01, .02, & .04	Rape. Unlawful sexual conduct with minor.
OKLAHOMA	16	21-45-1111	Rape
OREGON	18	163.315	Incapacity to consent; effect of lack of resistance.
PENNSYLVANIA	13	18-31-3102, 3121, and – 3122.1	Mistake as to age. Rape. Statutory sexual assault.
RHODE ISLAND	16	11-37-6 11-37-8.1	Third degree sexual assault. First degree child molestation sexual assault. –
SOUTH CAROLINA	14	16-3-655	Criminal sexual con-

CAROLINA			duct with minors.
SOUTH DAKOTA	16	22-22-1.	Rape defined -- Degrees -- Felony.
TENNESSEE	18	39-13-506.	Statutory rape.
TEXAS	17	5-21.11	Indecency With a Child
UTAH	18	76-5-401 76-5-401.2.	Unlawful sexual activity with a minor -- Elements -- Penalties --
VERMONT	16	13 V.S.A. 3252	Sexual assault
VIRGINIA	16	18.2-61. 18.2-63.	Rape. Carnal knowledge of child between thirteen and fifteen years of age.
WASHINGTON	16	9A.44.073 9A.44.076 9A.44.079 51	Rape of a child in the first degree Rape of a child in the second degree Rape of a child in the third degree
WEST VIRGINIA	16	61-8B-2 61-8B-5	Lack of consent.
WISCONSIN	18	948.01 948.02	Sexual assault of a child. (1) First degree sexual assault. (2) Second degree sexual assault
WYOMING	16 *	6-2-303 6-2-304	Sexual assault in the second degree..

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51 There are other statutes, which involved A inducing B, actor, to have sex with C, a minor. The age limits under those circumstances is somewhat higher, and involve special relationships between the actor and minor. Those statutes appear to regulate activity for reasons other than statutory rape or consent of the minor.

		6-2-308.	Sexual assault in the third degree.
Count 51			
Average Age:	15.26		
Minimum Age:	12		
Maximum Age:	18		
Number of States @ 18	8	16.0%	
Number of States @ 17	3	6.0%	
Number of States @ 16	16	32.0%	
Number of States < 16	23	46.0%	

No. 04-1144

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In The Supreme Court of the United States

KELLY A. AYOTTE,
Attorney General of the State of New Hampshire,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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N.H. Rev. Stat. Ann. § 263:41 (2004) 14

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Bennett, *Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis*, 62 Va. L. Rev. 285, 308 (1976) 11

1 W. Blackstone, Commentaries *447 10

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Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L.J. 645, 664-668 (1977) 11

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases such as *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

The Rutherford Institute is participating as *amicus* herein because it regards this case as an extraordinary opportunity for the Court to apply principles of law that acknowledge the rights reserved to states and the people to protect minors who confront serious life-changing decisions such as abortion.

---

[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent have been filed with this Brief. Counsel for the parties did not author any part of this brief. No person or entity, other than the Institute, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Petitioner, Ayotte.

SUMMARY OF ARGUMENT

The New Hampshire Parental Notification Prior to Abortion Act does not radically change the relationship between parents and their children. The Act merely seeks to defend the firmly rooted tradition of parents being involved in the major life decisions of their minor children by affirming parents in their role as guides and caregivers. The instant case questions whether a minor's extraordinary decision about abortion should be governed by a set of special, judge-made rules that exempt minors from routine parental involvement required generally in American law.

The Respondents challenge the facial validity of the New Hampshire Parental Notification Prior to Abortion Act and ask this Court to strike it down because, they assert, in some hypothetical circumstances it may be invalid. This Court, however, does not recognize application of the "overbreadth" doctrine "outside the limited context of the First Amendment." *United States v. Salerno*, 481 U. S. 739, 746 (1987). The prudential policy limiting overbreadth challenges to Free Speech cases is designed to prevent Federal Courts from ranging freely as "councils of revision" over state legislative action. It is rooted in the separation of powers and deference to the coordinate powers granted by the Constitution to the democratically elected branch of government. In cases involving non-First Amendment-related facial challenges, as this one, the Court has been careful to focus on the "pressing societal problem" that legislation seeks to address and to weigh whether the individual's "strong interest in liberty" may, "in circumstances where the government's interest is sufficiently

weighty, be subordinated to the greater needs of society." *Id.* at 750-51. Here the Respondents cannot establish that "no set of circumstances exists under which the Act would be valid." *Id.* at 745. In other words, the Respondents cannot succeed in their facial challenge because, on its face, the New Hampshire legislation is rationally related to a legitimate state objective and the means are reasonable in achieving the objective. *Id.*

In this case, the State of New Hampshire is advancing a bedrock principle that is widespread in American law. The legal system in the United States has historically protected minors when making important life decisions by requiring parental consent for those choices. Medical procedures provide one of the strongest examples of the parental consent requirement, since parents must consent for most medical care for their minor children. Additionally, the New Hampshire legislature, like many other states, carries the protection of minors even further by placing significant restrictions on minors' decisions; for example, completely prohibiting minors from engaging in activities such as tattooing. N.H. Rev. Stat. Ann. § 314-A:8 (2004). Even though certain exceptions are carved out from these general rules, the overarching policy of protecting minors remains firmly intact, especially for critical life decisions such as abortion.

The nature and language of abortion testifies to the extraordinary character of the decision, lifting it to a higher standard than tattoos. Since the law regularly requires minors to obtain parental consent for most life decisions, the standard should not be obliterated for an important medical decision such as abortion. To alleviate fears about the abortion decision being unduly burdened or overridden by a parent, the Act does not require *consent* of *both* parents, but only *notification* of a *single* parent. This lower standard still protects the tradition of parental involvement, while lessening any ostensible or hypothetical burden on the minor.

If the Court does not reverse the First Circuit's decision in the instant case, irreparable damage will be done to the parent-child relationship in one of the most traumatic of life decisions, whether to terminate what this Court has termed as "potential life."

ARGUMENT

INTRODUCTION.

The New Hampshire Parental Notification Prior to Abortion Act imposes criminal penalties on a physician's failure to provide 48 hours advance notice to parents of their child's impending abortion.[2] The Respondents allege that the Act is constitutionally invalid "on its face" because it fails to provide an exception for the health of the pregnant child. This brief addresses the important state interests the New Hampshire legislature has consistently advanced in legislation affecting the health and welfare of children and the proper standard of review to be applied in a "facial" challenge to the New Hampshire legislature's requirement of parental notification.

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[2] N. H. Rev. Stat. Ann. §§ 132:24 et seq. (2004). The New Hampshire legislature required forty-eight hours advance notice to a child's parent before an abortion can be performed, unless a parent waives notice in writing. Notice may be given in person or by certified mail, but is not required if the child confidentially petitions a court (in expedited proceedings) for waiver of notice. Notice may also be waived if a physician certifies that an abortion is necessary to prevent a minor's death and time is insufficient to provide notice. Failure to follow the notice procedures of the Act subjects the violator to a misdemeanor.

I. RESPONDENTS CANNOT PREVAIL IN THIS FACIAL CHALLENGE TO THE NEW HAMPSHIRE ACT BECAUSE THEY CANNOT MEET THE STANDARD OF REVIEW SET FORTH IN *UNITED STATES V. SALERNO*.

When the constitutionality of a statute is challenged on its face in a non-Free Speech case, this Court applies the standard of review set forth in *United States v. Salerno*, 481 U. S. 739, 746 (1987). In *Salerno*, this Court declared that "[a] facial challenge to a legislative Act is... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745. It is not enough that an Act's unconstitutionality under *some* circumstances might render it invalid; rather, the Court requires a showing that the law is invalid in virtually *all* of its applications. Thus, the "overbreadth" doctrine is not recognized "outside the limited context of the First Amendment." *Id.* This rule of judicial self-restraint serves as a prophylactic obstructing the Federal courts from ranging freely as "councils of revision" over state legislative action. It is rooted in the separation of powers and deference to the coordinate powers granted in the U. S. Constitution to the democratically elected branches of government, Federal and State. In such cases, the Court has been careful to focus on the "pressing societal problem" that legislation seeks to address and to weigh whether the individual's "strong interest in liberty" may, "in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *Id.* at 750-51. Thus, in reviewing this facial challenge to the New Hampshire legislature's parental notification requirement, the central issue is whether the legislation is rationally related to a legitimate state objective and the means reasonable in achieving the objective. *Id.* More specifically, are the Act's procedures rationally related to legitimate legislative concerns for the parent-child

relationship, and are the means chosen reasonably related to achieving that objective?

The judicial restraint reflected in the *Salerno* standard of review is now tested here in the context of abortion. The larger jurisprudential question in this case is whether the rule of law will be the same as in other overbreadth challenges in non-First Amendment cases, or whether this Court will promulgate a special set of rules for abortion. *Cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 98 (1976) (The "normal rules of law and procedure and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion.") (White, J., dissenting); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (The Court's abortion decisions threaten an institutionally debilitating effect by the adoption of special rules for abortion.) (O'Connor, dissenting). Assuming that the "normal" rules do apply in this case, the alleged overbreadth of the New Hampshire Act must be adjudged in light of the legitimate state interests it seeks to advance. Unless the Respondents can establish no set of circumstances under which the Act would be valid, the Act survives facial challenge and Respondents may prevail only after offering proof at trial, by clear and convincing evidence, that the parental notification procedures set forth in this Act do, in fact, "unduly burden" a child in seeking an abortion. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

Here, New Hampshire is acting pursuant to long-established societal concerns over the rights of parents to care for their children. This interest is rooted in ancient religious and moral codes,[3] in our country's history and in

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[3] For example, the Judeo-Christian tradition exhorts parents to bring up children in the way in which they want them to succeed. Proverbs 22:6 ("Train up a child in the way he should go, and even when he is old he will not depart from it."), 29:15 ("[A] child left to himself causeth shame to his mother."), The Tanakh (Jewish Bible); Ephesians 6:1-2 ("Children, obey your parents in the Lord, for this is right. Honor thy father and mother

well-established constitutional precedent. Not only did the Constitution forsake any express limitations on parental control of children—leaving such matters to the States and to the people under the Tenth Amendment—this Court has also interpreted the Bill of Rights as providing affirmative protection of the parent-child relationship, setting limits on State power that would otherwise interfere with the parental prerogative. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Employment Division v. Smith*, 494 U.S. 872 (1990); *Troxel v. Granville*, 530 U.S. 57 (2000). Accordingly, Justice Powell declared that "it is a cardinal principal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion), *quoting Prince v. Massachusetts*, 321 U.S. 166 (1944). The Court has endorsed this principle in numerous other cases, such as *Parham v. J.R.*, 442 U.S. 584, 602 (1979), where the majority stated:

> Our jurisprudence has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.... The law's concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

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which is the first commandment with promise that it may be well with thee. . . ."), Colossians, 3:20-21 ("Children, obey your parents in all things: for this is well-pleasing unto the Lord. Fathers, provoke not your children to anger, lest they be discouraged."), The Holy Bible (King James Version).

In the context of abortion, the Court has noted that parental involvement in the abortion decision is widely sanctioned in the states. *Hodgson v. Minnesota*, 497 U.S. 417, 425, n. 5 (thirty-eight states require participation in the minor's decision to terminate a pregnancy). This right of parental participation, as Justice Stephens has observed, stems from the "serious and personal consequences of major importance to a [person's] future" that flow from these decisions. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 781.

New Hampshire's parental notification requirement is thus grounded in constitutional tradition that reserves to the states and people the definition of the parental prerogative. As will be seen below, the New Hampshire parental notification requirement is but one facet of New Hampshire's far broader regime of law affirming parental involvement in decisions affecting the welfare of children. The Respondents would have the Federal courts minimize, overrule or revise these important legislative concerns in the abortion context. Without offering an evidentiary record or clear and convincing evidence that the Act inhibits the exercise of constitutional rights, Respondents ask this Court, in effect, to assume the role of super-legislature with the power to veto or rewrite legislative acts based upon hypothetical applications of allegedly defective procedures. This Court should decline this invitation. Respondents should be required to demonstrate, as all litigants must in facial challenges, that there is "no set of circumstances" under which the Act is valid. Because Respondents cannot do so on this record, the decision below should be reversed.

II. AMERICAN LAW FIRMLY PROTECTS MINORS BY REQUIRING PARENTAL CONSENT FOR IMPORTANT DECISIONS.

An overwhelming principle of American law is that minors cannot consent or participate in most socially

significant activities without parental input or guidance. Federal, State and local laws have developed a series of rules to protect minors from making poor decisions in situations with serious societal implications. These protections operate robustly, especially in the arena of medical care. Not only has New Hampshire limited a minor's ability to consent to most medical procedures, it has also enacted several statutes designed to safeguard the decisions of minors. While there are certain exceptions, they govern situations markedly different from the instant case. Thus, public policy, the common law and state statutes affirm the protection of minors and the parent-child relationship. Parental involvement in the decisions of minors is the norm, as is seen below in long-established common law rules.

A. TRADITIONAL COMMON LAW RULES PROTECT MINORS FROM IMPRUDENT CHOICES.

American law regards the right to control one's body and destiny as one of a person's most sacred rights. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Even with the sacred reverence for the right of bodily control, minors are generally not allowed to control their bodies with respect to medical decisions. Thus, with regard to most medical decisions, parents must consent for their minor children.

Indeed, the American constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). *See also Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). As this Court wrote in Parham, 442 U.S. at 603-04:

Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.

* * * * *

Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can, and must, make those judgments. Here, there is no finding by the District Court of even a single instance of bad faith by any parent of any member of appellees' class. We cannot assume that the result in *Meyer v. Nebraska, supra,* and *Pierce v. Society of Sisters, supra,* would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a

> parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child. *See generally* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L.J. 645, 664-668 (1977); Bennett, *Allocation of Child Medical Care Decisionmaking Authority: A Suggested Interest Analysis*, 62 Va. L. Rev. 285, 308 (1976). Neither state officials nor federal courts are equipped to review such parental decisions.

Therefore, the importance of protecting minors in making potentially life-changing decisions has long been recognized. On one hand, the law vigorously protects the right to control one's own body. On the other hand, an entire segment of the population is excluded from exercising that right without the consent of others. The protection of the minor and regard for the parent-child relationship explains this seeming inconsistency. The right to control one's body is so important in America that the law attempts to ensure the people exercising that right are mature and competent. In order to protect minors from harmful decisions and safeguard the control over their bodies, the common law gives the duty of medical consent to parents.

Another principle that protects minors from harmful decisions hails from contract law. Minors are unable to create binding contracts like adults; instead, minors may only create voidable contracts. Restatement (Second) of Contracts § 14 (1981). Thus, minors do not hold the same status as adults under the law. The law creates this distinction in recognition that minors lack the same foresight and prudence of adults and may unwisely bind themselves to harmful contracts. For these reasons, the law allows minors only to create voidable contracts.

Tort law provides a third and more explicit example where minors are protected from destructive decisions and actions. In order to compensate for their reduced capacity in decision-making, the law applies a lower standard of care to determine whether a minor's behavior was negligent. Minors are judged according to the standard of "a reasonable person of like age, intelligence, and experience under like circumstances." Restatement (Second) of Torts § 283A (1965). The precise justification given for this lower standard of care is society's interest in the welfare and protection of children. Restatement (Second) of Torts § 283A cmt. b (1965).

These three areas of law—medical consent, contracts and torts—establish robust protection for minors. The law compensates for lack of maturity by requiring parental consent for medical procedures, allowing minors only to create voidable contracts and lowering the applicable standard of care in torts cases. It is not surprising, therefore, that the New Hampshire legislature would apply similar protection by requiring parental notification of an impending abortion.

B. The New Hampshire Legislature Has Also Enacted Restrictions on Choices Available to Minors.

In addition to common law restrictions on a minor's decision-making prevailing generally throughout the country, New Hampshire has adopted other measures to protect minors from harmful decisions. Various policies enacted by the legislature require parental consent for choices by minors or even remove the minor's choice altogether. These statutes impose requirements similar to prior parental notification of abortion decisions by minors, but no court would ever suggest strict scrutiny or the invalidation of these requirements as being unduly burdensome on a minor child's control of his or her body.

New Hampshire law restricts a minor's choice in obtaining body art. It forbids the "branding" or "tattooing" of anyone under the age of eighteen. N.H. Rev. Stat. Ann. § 314-A:8 (2004). In its complete ban on tattoos, regardless of parental consent, the statute stands as a sort of upper limit on the protection of minors from poor decisions. A second provision requires parental consent for minors to obtain a body piercing. If consent is granted, the parent must not only be physically present when the piercing takes place but must also present evidence of parenthood and sign a document consenting to the procedure. *Id.* These strict requirements illustrate the strong desire of the New Hampshire legislature to protect minors and involve parents in decisions concerning their bodies.

New Hampshire likewise requires parental consent for anyone under eighteen to patronize a tanning salon. N.H. Rev. Stat. Ann. § 313-A:31 (2004). The statute requires the same consent procedure as body piercing, although the parent need only sign a form at the minor's first visit, which provides consent for twelve sessions. *Id.* The restrictions on body tanning provide an even stronger example of New Hampshire's desire to protect minors, since children under fourteen can only use tanning facilities with a written doctor's order. *Id.* In order to protect minors from the harmful effects of prolonged tanning, the legislature has enacted both parental and doctor consent provisions, which support the overall goal of ensuring parental involvement in the decisions of young people.

New Hampshire also restricts minors who seek to make anatomical gifts of bodily remains. While adults can simply fill out a form along with their driver's license[4], a

[4] Minors in New Hampshire cannot obtain a driver's license without written parental consent. N.H. Rev. Stat. Ann. § 263:17 (2004).

minor must obtain written consent from a parent or guardian. N.H. Rev. Stat. Ann. § 263:41 (2004). This policy falls perfectly in line with the general common law rule that minors cannot consent to medical procedures. It also illustrates New Hampshire's dedication to the protection of minors and the parent-child relationship.

The criminal law of New Hampshire also contains important protections for minors. No minor under age seventeen can plead guilty or waive the right to counsel without parental consent. N.H. Rev. Stat. Ann. § 605:1 (2004). The state seeks to ensure that minors make wise decisions and receive counsel in life-altering decisions that take place during criminal proceedings by requiring parental consent to the choices that are made.

Another New Hampshire provision, and perhaps most directly applicable to this case, is the protection of minors reflected in provisions of the New Hampshire criminal code. In New Hampshire, statutory rape is defined as sexual penetration with someone (other than your spouse) who is between thirteen and sixteen years old or any sexual contact with someone other than your spouse who is under thirteen years; these offenses constitute Class B felonies. N.H. Rev. Stat. Ann. § 632-A:3 (2004). The New Hampshire Supreme Court has firmly interpreted this statute to mean that minors under age sixteen cannot consent to sex. *See State v. Berry*, 373 A.3d 355, 357 (N.H. 1977). The legislature's protection of children thus extends into the realm of reproductive behavior. Furthermore, the court required that this law should be "applied to those under the age of consent regardless of their maturity and the fact that a female's apparent maturity may mislead a man ...." *Id.* It does not matter how mature a fifteen-year-old might be or how mature she might appear. If a man engages in sexual

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Furthermore, a minor's license may be cancelled upon notice that the consenting adult died. *Id.*

penetration, he commits a Class B felony. In such cases, the minor's pregnancy provides evidence that someone committed a crime of sexual intercourse with a minor under age sixteen. Allowing the minor to abort the child without parental notification may even destroy critical evidence of criminal activity and shield perpetrators from prosecution. New Hampshire's statutory rape law thus operates as a strong bulwark against the abuse of minors and robustly supports requiring parental notification for abortion. If a minor cannot consent to sexual intercourse or routine medical procedures, it is difficult to understand why a minor should be able to obtain an abortion secretly without parental notice, let alone parental involvement.

C. NARROW EXCEPTIONS ALLOW MINORS TO CONSENT ONLY IN LIMITED CIRCUMSTANCES.

New Hampshire admittedly provides certain exceptions where minors can give consent, but these are limited to decisions made in specially defined circumstances. The first two situations allow minors to consent to medical treatment for drug addictions and sexually transmitted diseases. In both instances, the New Hampshire legislature allows minors to consent to such medical treatment without parental consent. N.H. Rev. Stat. Ann. § 318-B:12-a (2004) (drug addiction); N.H. Rev. Stat. Ann. § 141-C:18 (2004) (sexually transmitted diseases). However, age requirements still apply. To consent to treatment of drug addiction, the minor must be at least twelve-years-old, § 318-B:12-a, while treatment for sexually transmitted diseases requires the minor to be at least fourteen-years-old. § 141-C:18. Even though some minors may, therefore, consent for medical treatment in these cases, most minors still cannot.

The cases of consent for treatment of drug dependency and sexually transmitted diseases stand in stark contrast to abortion. The former are almost universally regarded as desirable treatment for universally recognized

adverse medical conditions. The treatment of these conditions also benefits society by helping rid it of a significant social problem. Moreover, the treatment for these conditions, if successful, will not likely have long-term adverse consequences. With abortion, not only is society polarized over whether it is sound social policy to permit the early termination of a pregnancy and when, and the means and methods therefor, but the abortion decision is an elective procedure, deserving of deliberation and fraught with long-term consequences. While it may be socially beneficial for minors to obtain necessary medical treatment for drug dependency or sexually transmitted disease without parental involvement, controversial and life-altering medical procedures such as abortion have more grave consequences.[5]

New Hampshire law also permits minors to receive emergency care without parental consent. Licensed emergency care providers and health professionals cannot be held civilly liable for lack of consent when administering emergency care to minors, if a parent or guardian is not available to consent. N.H. Rev. Stat. Ann. § 153-A:18 (2004). The statute, however, does not empower minors to consent but rather admits their inherent incapacity to consent, seeking at the same time to protect healthcare professionals from civil liability for acts undertaken in protecting them. Furthermore, the statute applies to "any person, regardless of age." *Id.* This emergency care statute protects minors and

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[5] The narrow exceptions for treatment of drug dependency and sexually transmitted diseases do not evidence any intent by the New Hampshire legislature to extend to minors the general right to consent to medical treatment. During its debates over the drug dependency statute, § 318-B:12-a, language was proposed that would give minors the ability to consent to surgical and dental treatment, but the New Hampshire legislature expressly rejected this proposal. 1 Journal of the Senate 694 (N.H. 1971) *cited in* N.H. AG Lexis 21, 2-3 (1985). The legislature's rejection confirms its intent to limit the scope of minor consent only to treatment of drug dependency and sexually transmitted disease.

provides an exception to the consent rule, but does not permit minors to obtain general medical care without parental involvement.

Married minors do gain the power to consent, but only in limited circumstances. In American law, marriage emancipates a minor. *Paju v. Ricker*, 266 A.2d 836, 837 (N.H. 1970). However, "[t]he meaning of emancipation is not that all the disabilities of infancy are removed, but that the infant is freed from parental control...." *Commonwealth v. Graham*, 31 N.E. 706, 707 (Mass. 1892). Most importantly, marriage only removes disabilities of infancy when specifically provided for in statutes. *Paju*, 266 A.2d at 837. Therefore, the New Hampshire legislature still asserts its traditional right to regulate the ability of married minors to consent to defined social relationships.[6]

III. ABORTION DECISIONS DEMAND MORE GUIDANCE THAN EVERYDAY CHOICES.

As seen by the series of common law rules and New Hampshire state statutes, most decisions by minors are subject to parental consent requirements. Abortion does not fit into the array of everyday decisions made by minors; it is more serious and arguably requires even more parental guidance.

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[6] New Hampshire provides a fair amount of autonomy for married minors. Married minors, regardless of their age, are free to engage in consensual sexual relations. *Id.* Married minors can also consent to donate blood without obtaining consent from their parents. N.H. Rev. Stat. Ann. § 571-C:1 (2004). Likewise, the Parental Notification Prior to Abortion Act includes married minors as emancipated minors who do not need parental notification to obtain an abortion. N.H. Rev. Stat. Ann. § 132:24 (2004). Thus, under the terms of the Act, marriage provides minors with presumptive emancipation and, hence, the power to consent.

A. ABORTION CONSTITUTES MEDICAL TREATMENT WHICH REQUIRES PARENTAL PARTICIPATION.

On a rudimentary level, abortion would appear to fall in line with medical and body treatments provided to minors. According to information supplied by the Respondent Planned Parenthood of America (a leading provider of abortions), the three types of abortion—chemical, surgical and vacuum aspiration[7]—all require the participation of a doctor or someone else licensed and skilled in the procedure and qualified to prescribe medication. As with other medical treatment, these state regulatory requirements are in place because of the serious nature of the procedures in question and the possibility of grave complications. Under New Hampshire law, parents must consent for a minor's medical treatment and even to a minor's receiving body art and piercing. Abortion thus naturally falls into the normal range of activities affecting a minor's medical well-being and bodily autonomy, activities that under New Hampshire law normally require extensive parental involvement.

In a deeper sense, obtaining an abortion has far greater lifetime implications than most other medical treatment. This Court has stated that abortion has "potentially grave emotional and psychological consequences...." *H.L. v. Matheson*, 450 U.S. 398, 412-413 (1981). Therefore, if a minor's abortion decision implicates heightened consequences, it is not unreasonable to impose greater requirements for parental involvement than those permitted for less consequential matters. Of course, in the present case, the legislature has only required *notification*, not the *consent* required by New Hampshire in other less

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[7] *Choosing Abortion - Questions and Answers, at* http://www.plannedparenthood.com/pp2/portal/files/portal/medicalinfo/abortion/pub-abortion-q-nd-a.xml (July 14, 2005).

consequential situations. At the very least, the medical nature of the abortion procedure, combined with its emotional and psychological effects, argues for parental notification before a minor obtains an abortion, especially in light of the potential impact on a minor's sphere of reproductive autonomy.

B. MINORS DO NOT HAVE UNFETTERED REPRODUCTIVE AUTONOMY.

The previous discussion indicates that under New Hampshire law, and the common law, minors have no general power to consent to many social activities, particularly for medical decisions like abortion. Combining New Hampshire's sexual assault statutes along with the general rule against minors consenting to medical treatment, minors have only a tiny sphere of reproductive autonomy. As indicated, most minors do not have the power to consent to sexual intercourse, the essential key to reproduction. *See* N.H. Rev. Stat. Ann. § 632-A:3 (2004). More importantly, a pregnant minor in New Hampshire does not even have the power to consent to medical treatment concerning the pregnancy. If a girl becomes pregnant and decides to carry a child to term, she must obtain consent from her parents in order to receive medical treatment.[8]

Since most minors cannot consent to sexual intercourse, and all must obtain parental consent for medical treatment during pregnancy, it would be wholly incongruent, let alone highly unwise, to deny parental involvement in connection with an abortion. Furthermore, the New Hampshire exception for the treatment of sexually transmitted diseases, N.H. Rev. Stat. Ann. § 141-C:18 (2004), far from expanding reproductive autonomy, simply

[8] At least one state, Utah, specifically allows a pregnant minor to consent to medical treatment. Utah Code Ann. § 78-14-5(4)(f) (2005). However, New Hampshire does not have such a statute, requiring the default consent from parents in the event of a minor's pregnancy.

provides a means for prompt, effective treatment of highly contagious diseases for the benefit of the minor and to prevent the spread of the disease in society.

C. PARENTAL INVOLVEMENT DOES NOT CONSTITUTE AN UNDUE BURDEN.

In assessing evidence of a statute's impact on abortion, this Court has employed the "undue burden" standard. *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992). In the Court's own terms, undue burden means "that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

The New Hampshire Act is challenged on its face as not meeting the undue burden standard. However, in assessing this contention, as mentioned earlier, the challengers must show first that the New Hampshire Act is not valid under any set of circumstances. *United States v. Salerno*, 481 U. S. at 746. The Respondents cannot do this because the Act presents a measured approach to parental notification containing appropriate safeguards, such as judicial bypass and health safeguards. It cannot be said to be invalid in virtually every set of circumstances, let alone substantially overbroad. Moreover, the "undue burden" analysis requires the Respondents to show by clear and convincing evidence that the statute and its implementation actually impose an "undue burden" on abortion, something the Respondents have not done in this facial challenge.

In the context of other legislation enacted in New Hampshire restricting the reproductive and medical rights of minors, the parental notice statute can hardly be said to unduly burden abortion. The meaning of the term "undue" is "excessive." Black's Law Dictionary 1239 (7th ed. abridged 2000). The common understanding of "excessive" is "exceeding the usual, proper, or normal ...[or] greater than

usual...." Webster's Dictionary 792 (3rd ed. 1986). The numerous New Hampshire enactments limiting the rights of minors and requiring parental involvement in a wide variety of situations involving sexual and bodily autonomy demonstrate that the procedure for parental notification for a minor's abortion is not "excessive," but is in accord with usual and proper laws governing minors' behavior and rights. Minors simply do not have the general power of consent, especially for medical procedures. Merely requiring *notification* of a minor's parent before an abortion does not exceed the usual, normal or proper procedures protecting minors. Nor is it excessive or otherwise an "undue burden" on abortion, most certainly not on a bare facial challenge to the Act with little or no record.

As previously discussed, minors must routinely obtain parental consent for most decisions in their lives, especially those decisions related to medical care. Moreover, the law properly recognizes that most minors are immature and lack the full capacity to understand the significance of certain decisions. Thus, it requires safeguards, for example, voidable contracts, even with parental consent. To require mere notification of a parent for a minor to obtain an abortion is not a "substantial obstacle," but merely a safeguard that the minor will evaluate all of the consequences of the abortion decision. While some parents might react strongly when notified about their child's upcoming abortion, the notification does not necessarily prevent an abortion or even significantly delay it, but ensures that the child's decision will be well-considered in light of the potential consequences that follow, whatever that decision may be.

CONCLUSION

All of the foregoing statutes and decisions evidence the strong principle in American law that minors must obtain parental consent for their decisions. The law seeks to

protect minors from poor choices due to their lack of maturity, while at the same time strengthening the family. This Court summarized the concept well when it said, "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Minors need the involvement of parents when making difficult decisions. Without this assistance, they stand on the precipice of destructive decisions and poor choices. New Hampshire's Parental Notification Prior to Abortion Act only requires notice to one of a minor's parents forty-eight hours prior to an abortion. This Court should uphold the decision of the democratically elected branch to protect and preserve the vital parent-child relationship. America's parents, sons and daughters deserve no less when confronted with the decision to terminate the life of an unborn human being.

Respectfully submitted,

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In The
Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,
Petitioner,

v.

PLANNED PARENTHOOD OF
NORTH NEW ENGLAND; ET AL.
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

BRIEF OF AMICUS CURIAE
of the Horatio R. Storer Foundation, Inc.
In Support of Petitioners

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INTEREST OF AMICUS CURIAE[1]

The Horatio R. Storer Foundation, Inc., is an educational foundation of the National Right to Life Committee, Inc. It is a not-for-profit 501(c)(3) corporation, and its purpose is to further in-depth research and writing and to sponsor legal activities relating to abortion, withholding and withdrawing life-sustaining treatment or care, suicide, assisted suicide, mercy killing, and aspects of human experimentation.

SUMMARY OF THE ARGUMENT

The purpose of this brief is to demonstrate that the Respondents – various abortion providers – lack third party standing to assert the rights of minors in challenging the lack of a health exception, the adequacy of confidentiality provisions, the adequacy of the life exception, and the "chilling effect" on minors of the New Hampshire statute at issue (the "Act"). Since there is no minor plaintiff in this case, the abortions providers' claims against the lack of a health exception and the adequacy of the confidentiality must be dismissed. The abortion providers also fail to assert that they treat or have treated a minor who would be harmed by alleged inadequacy of the Act's life exception, so their third party claims against the Act's death exception and its chilling effect on minors must also be dismissed.

The Act provides a framework for decision making for presumptively incompetent minors before abortion. Since

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[1]**U. S. Supreme Court Rule 37.6**: Amicus Curiae discloses that (1) no counsel for a party authored this brief in whole or in part, and (2) a partial monetary contribution was made toward the preparation or submission of this brief by the Alliance Defense Fund. **U.S. Supreme Court Rule 37.3(a)**: Petitioners and Respondents consented to the filing of this brief. Consent letters have been provided to the Clerk of this Court.

minors are presumed incompetent to make important decisions, the Act provides for parental notice and presumed consultation In the alternative, it provides a court proceeding by which the minor is determined to be sufficiently mature to make abortion decision without notice or, if the minor is deemed immature, then the court determines whether parental notice or the abortion itself is in the minor's best interests.

The abortion providers challenge aspects of this framework on behalf of minor patients, but should not be permitted to do so because they have a potential conflict of interest with mature minors who would choose not to secure an abortion and immature minors for whom abortion is not in their best interests. The abortion providers might properly claim to represent competent women seeking abortions, but here they challenge a statute that is intended to determine whether abortion can or should be sought in the first place. In effect, the abortion providers seek to represent the interests of persons, many of whom would not or should not have an abortion at all, and this they should not be permitted to do.

Moreover, although the providers can claim special expertise and a special interest in performing abortions, they can claim no such expertise in determining whether minors are mature or whether abortion or parental notice is in the minor's best interests. Thus, they should not represent minors in challenging procedures to determine minors' best interests and maturity.

Article III of the U.S. Constitution requires an injury in fact to occur to a litigant in a real and concrete case or controversy, and thus a litigant purporting to represent third parties not before the court must themselves plead and prove an injury by the law complained against. Here, the abortion providers failed to allege that they treat or treated minors who are in need of the blanket

health exception, confidentiality, or life exception that they claim is inadequate, so lack standing to assert minors' interests.

There is a strong presumption against third party standing rooted in Article III, and to warrant third party standing, the litigant must show that enforcement of a statute against him would indirectly result in violation of the third parties' rights. Here, the abortion providers allege no injurious effects on themselves, but only on minors, as the result of a lack of a health exception and can claim no such injury to themselves on account of the confidentiality provisions of the Act, which apply only to the courts.

In addition, there are two specific requirements for third party standing: 1) a close relationship between the litigant and the third party such that the litigant is fully, or very nearly, as effective a proponent of the right at issue as the third party; and 2) that there is no special obstacle to the third party asserting her own interest.

There remains a presumption against third party standing in the abortion context, though the courts have allowed it in some circumstances. U.S. Supreme Court precedent gives no clear answer whether abortion providers can properly represent both mature and immature minors, as the abortion providers here propose, or any minors at all in challenging a statute intended itself to assure minors' best interests or mature competence. Analysis of specific factors governing third party standing reveals, however, that it should be denied here.

First, the abortion providers alleged no injury to themselves as the result of a lack of a blanket exception to the Act for "prompt" health abortions. Moreover, enforcement of the lack of health exception would not lead to the violation of minors' rights when the minors are mature and decide against abortion or immature and the court determines that neither parental notice

nor the abortion itself is in the minors' best interests. Finally, there is no "close relationship" between all minors and the abortion providers when many of them would not or should not receive abortions based on their decisions, whether or not with parental notice, or the decision of the courts.

Second, the abortion providers should be denied third party standing to challenge the adequacy of the life exception because they did not specifically allege that they treat or treated minors in need who would be denied abortion as the result of the exception. Moreover, the life exception amount to a per se best interest determination in the context of the Act, and thus relates to the decision for or against abortion rather than performance of abortion itself. The abortion providers should not represent minors for the purpose of deciding whether abortion is to be decided upon, as opposed to whether it can be performed once decided upon.

Third, the confidentiality provisions of the Act pose no threat to the abortion providers because they are directed solely at courts determining the minors' competence or best interests. Thus, the abortion providers themselves can claim no cognizable injury as the result of these procedures, so they cannot challenge them on behalf of minors.

Fourth, the abortion providers' claim that the minors are chilled by virtue of aspects of the act that they claim are vague and provide inadequate standards of proof is simply a redundant restatement of their own claims against the Act rather than any new claim on behalf of minors. Moreover, it is incoherent to claim that minors' access to abortion is "chilled" by provisions that only chill abortion providers.

Finally, there is no special obstacle to minors representing their own interests in challenging the Act. Numerous cases involving similar challenges to parental notice and consent to

abortion have included been brought by minor plaintiffs. Moreover, the Act itself provides for appointment of a guardian ad litem and appointment of counsel for minors.

ARGUMENT

Amicus Curiae Horatio R. Storer Foundation, Inc., ("Storer") argues that Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. (collectively, the "abortion providers") lack third party standing to challenge the lack of a blanket health exception, the adequacy of the life exception, confidentiality provisions, and a chilling effect of New Hampshire's Act governing abortions performed on minors, 2003 N.H. Laws ch. 173, codified at N.H. Stat. Ann.§§ 132:24 to :28 (the "Act"). That is, the abortion providers lack *jus tertii* standing to assert their patient's rights, as stated in the First Cause of Action of their Complaint, ¶ 31:

> The Act deprives plaintiffs' patients of their right to privacy as protected by the Fourteenth Amendment to the United States Constitution by (a) failing to allow prompt abortions necessary to protect the woman's health; (b) by failing to provide an adequate emergency exception to protect their lives; (c) failing to provide a confidential judicial waiver procedure; (d) chilling the provision of abortions services by failing to give clear notice of what conduct is prohibited by the Acts terms and placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability.

Because there is no minor plaintiff seeking relief in this case, these claims must thus be dismissed.

I. Third Party Standing Should Be Denied When, As In This Case, the Interests of the Proposed Third Party Are Potentially Adverse to Those Whom the Third Party Would Represent.

The Act provides a judicial framework for deciding whether a minor is a competent decision maker or, if she is not, whether an abortion and parental notification of the abortion are in the minors' best interests. Under the Act, minors are presumed incompetent, and thus unable to make their own decision for abortion, at least without the parental consultation that presumably attends parental notice or, after a court determination that this is not in the minors' best interests, then with judicial consent if the court holds that an abortion is in the minors' best interests. N.H. Rev. Stat. § 132:26 (II).

The abortion providers should not be permitted third party standing to attack this framework as though they adequately or impartially represented the interests of their minor patients. They are professionally competent to perform abortions already decided upon and to decide whether a medical reason exists for performing abortion on their patients, including their minor patients. But they have no special competence to determine whether the minor is mature enough to make a decision for or against an abortion, whether the proposed abortion is generally in the minor's best interests, or whether the degree of confidentiality about the proposed abortion on the minor is appropriate.

That is, abortion providers are certainly competent to determine if some medical reason exists for an abortion. But they have no proper role in deciding for the minor whether such an abortion should in fact be performed – which is the province of the mature minor or a court or parents acting in her best interests – much less whether the child's parents should be notified that it is to be performed.

Storer does not dispute that abortion providers may generally and properly assert *jus tertii* standing for their pregnant patients who have competently chosen to procure abortion. *See, e.g., Singleton v. Wulff,* 428 U.S. 106, 113, 117 (1976). But minors are presumed to be unable to make their own decisions in this regard, thus warranting the very sort of statute that the Act represents and which this Court has sanctioned. *See, e.g., Baird v. Bellotti,* 443 U.S. 622, 812 (1979). In attacking the Act on behalf of minors, the abortion providers thus purport to stand in the place of women who are, in effect, as yet undecided and potentially unable to decide whether an abortion should be even be performed upon them in the first place. They propose to stand in the place of minors to attack a statute that is intended to assure that any abortion is the consequence of the minors' competent choice or in the minors' best interest.

Plainly, third party standing would not be allowed in any other similar circumstance. The federal courts would not allow automobile dealers third party standing on behalf of their potential customers to challenge "lemon laws" or laws intended to assure that the customers are competent to enter into contracts for sales. The courts likewise would not permit physicians to represent their patients in challenging protective laws that require proof of sufficient maturity or court sanction before the same physicians may permanently sterilize them. The courts would not permit lawyers to represent persons declared mentally incompetent in challenging a proceeding to determine whether the persons were competent to hire a lawyer or needed legal representation.

In such cases, those asserting third party standing have a potential conflict of interest with those they purport to represent that disqualifies them from properly representing the rights and interests of the other. The same is true here: The abortion provider purports to represent the rights and interests of persons

to procure abortion who may not even competently choose to or should not have an abortion. Abortion providers represent only one side of the abortion versus childbirth equation that the Act seeks to solve for minors, so they cannot fully or adequately stand in the minors' litigation shoes.

The defect in the claimed third party standing of the abortion providers strikes at the heart of the purpose of Article III of the Constitution. Injuries suffered by minors and abortion providers as the result of the Act may often not be the same. The case or controversy that minors and the abortion provider have against or with the Act may often not be the same. Indeed, the interest of abortion providers in providing abortion without the Act's intervention may often be positively adverse to minors' interest in assuring competent decision making in the minors' best interest that the Act is simultaneously intended to assure.

Abortion providers suffer an injury as the result of the Act if and only if they treat a minor subject to the strictures of the Act that they complain of and: 1) a minor is determined to be immature by virtue of the Act and the abortion is determined not to be in her best interests, 2) the minor is determined to be mature and decides against the abortion even if thought by the others to be in her best interests, or 3) the Act's confidentiality provisions deter seeking abortion because of parental knowledge and input. In other words, the abortion provider suffers an injury by virtue of the very features of the Act intended to confer a benefit on the minor. The provider suffers because it loses the minor as a patient and so loses whatever business she would have brought to the arrangement as a consequence. But the minor is simultaneously deemed to benefit by the Act because her best interests were rightly served by childbirth or because it assures that she has made a mature decision to exercise her fundamental right to bear a child.

Abortion providers may properly represent their minor patients in attacking the Act only if it is assumed that it is *always* in the minor's interest to be aborted – regardless of whether the minor is sufficiently mature to choose abortion and regardless whether this may be in her best interests. This is obviously not the case, so abortion providers have no business whatsoever representing the interests of minors in challenging regulatory aspects of the Act governing determination of the minors' competence, best interests, or confidentiality. They have an inherent potential conflict of interest with those of many of the very minors they purport to represent.

To permit the abortion providers to challenge these aspects of the Act on behalf of minor patients before it is decided that the minors even want or should have confidential abortions puts the substantive cart before the standing horse. It cannot be reconciled with the threshold requirements of Article III of the Constitution.

II. Article III of the U.S. Constitution Dictates That the Abortion Providers Should Be Denied *Jus Tertii* Standing.

The requirement of standing is intended to implement the Framers of the Constitution's concept of "the proper – and properly limited – role of the courts in a democratic society." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (*quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76 (1982). Article III's limitation of federal court jurisdiction to actual "cases" and "controversies" justifies the exercise of federal judicial power only "as a necessity in the determination of real, earnest, and vital controversy." *Chicago & Grand Trunk R.R. v. Wellman*, 143 U.S. 339, 345 (1892) (*quoted in Valley Forge*, 454 U.S. at 471). Thus, a plaintiff must allege and later prove an injury that is fairly

traceable to the defendant's challenged conduct and that is likely to be redressed by the relief sought. *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 472. If the plaintiff cannot do so, then federal courts must dismiss the case as beyond its power to decide when in the litigation the flaw is discovered or arises. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986).

There is no minor plaintiff in this case, and Storer does not dispute that a pregnant minor might properly claim on her own behalf that the Act obstructs her right to secure an abortion. Nor does Storer argue that the abortion providers here might not properly claim a threatened injury by the Act in performing abortions upon minors, assuming they have otherwise properly pleaded and proven that they perform abortions on pregnant minors for reasons the Act forbids. *But see* this Brief at 11-12.

Storer argues that the abortion providers cannot properly claim third party standing to assert the rights and interests of minors as stated in their Complaint, ¶ 31, which involve the lack of a health exception, adequacy of the life exception, adequacy of confidentiality, and supposed chilling effects on the minors because these aspects of the Act affect only the minor and the abortion providers have potentially adverse interests to those of the minor under the Act with regard to them.

That is, only the minor can assert a " real, earnest, and vital controversy" with regard to these aspects of the Act because they relate to the decision whether or not abortion is to be performed in the first place on a presumptively incompetent person, and who may know of this, not to manner of performance of the abortion itself. The abortion providers can claim no real, constitutionally cognizable injury fairly traceable to the Act simply because it forbids them to perform immediate abortions on minors at will whenever they detect a medical reason to do

so, regardless of the minor's competence to consent to the procedure or her best interests.

A. *The General Rule Parties Is That Parties Must Represent Their Own Interests in Federal Litigation.*

Because of Article III's "case and controversy" provision," plaintiffs are typically required to "assert [their] own legal rights and interests, and cannot rest [their] claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. at 499. As such, there is a presumption against third party standing that requires individuals to represent their own interests that exists in all federal cases: "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. at 255; *see also, e.g., Singleton v. Wulff*, 428 U.S. at 113. Underlying this presumption is the recognition that "third parties themselves usually will be the best proponents of their own rights." *Id.* at 114. It is this presumption that a plaintiff must overcome when seeking to assert the rights of non-participating parties.

B. *Third Party Standing Is Allowed In Certain Exceptional Circumstances.*

Although there is a strong presumption against third party standing, it is not absolute. To overcome it, litigants must initially demonstrate that they have standing themselves and have suffered an injury in fact. *Miller v. Albright*, 523 U.S. 420, 447 (1998) (O'Connor, J., concurring) (*citing Powers v. Ohio*, 499 U.S. 400, 411 (1991)). In this regard, the abortion providers nowhere allege that they are harmed by the lack of a health exception, but challenge the lack of health exception solely on behalf of minor patients. The confidentiality provisions of the Act nowhere penalizes them, and they claim only that the supposed inadequacy of the life exception harms minors in need of abortion. Complaint, ¶ 27. They claim that minors' access to

abortion is "chilled" because of an inadequate life exception and lack of good faith immunity – but this claim is indistinguishable from the claims they make on their own behalf unrelated to any need for third party standing in the Second Cause of Action of their Complaint, ¶ 32.[2] Thus, it is certain that the abortion providers have asserted Article III standing on their own behalf to attack the Act's lack of a blanket health exception or confidentiality provisions, and at least doubtful that they have alleged sufficient facts sufficient for third party standing to attack the adequacy of the death exception or to claim a separate chilling effect of the Act on minors.

Moreover, litigants may be "allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Warth*, 422 U.S. at 510. In the present context, this would mean that the injurious effects *on the abortion providers* of the Act's challenged lack of a blanket health exception, the adequacy of its life exception, and the adequacy of its confidentiality provisions must indirectly result in the violation of minors' abortion rights. In sum, the abortion providers must allege and prove that they are injured by the Act *and* that the injury they suffer will result in creating an obstacle to abortion for the minors they would represent, and they have failed to do so.

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[2]"The Act deprives plaintiffs of due process of law as protected by the Fourteenth Amendment to the United States Constitution by (a) subjecting plaintiffs to criminal prosecution and civil liability for providing abortions to prevent the minor's death without clearly providing that they may rely on their good faith medical judgment in certifying that such abortions are necessary to prevent the minor's imminent death; (b) containing vague and/or conflicting terms that fail to give plaintiffs adequate notice of what conduct the law prohibits; and (c) placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability."

Finally, there are two specific requirements to qualify for third party standing:

> First, we have asked whether the party asserting the right has a "close" relationship with the person who possesses the right. Second, we have considered whether there is a "hindrance" to the possessor's ability to protect his own interests.

Kowalski v. Tesmer, __ U.S. ___, 125 S.Ct. 564, 567 (2004) (*citing Powers v. Ohio*, 499 U.S. at 411); *Albright*, 523 U.S. at 447 (O'Connor, J., concurring).

When considering the first requirement, the Court reviews whether "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue." *Singleton*, 428 U.S. at 114-115. In this regard, the Court determines whether "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* This requirement has been narrowly construed: The relationship between the third party and the litigant cannot simply be like the connection between a vendor and potential vendees, but must be like "the relationship between one who acted to protect the rights of a minority and the minority itself." *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972) (*cited by Craig v. Boren*, 429 U.S. 190, 216 (1976) (Burger, J., dissenting)).

When considering the second requirement, the Court determines the ability of the third party to assert her own right. *Singleton*, 428 U.S. at 115-116. In this regard, it must be "difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Barrows*, 346 U.S. at 257. Thus, for example, when the Court was faced with an organization bringing suit on behalf of its members to protect those members' names from being divulged, the Court

found that the organization satisfied this requirement because "[to] require that [the right] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." *NAACP v. Alabama*, 357 U.S. 449, 459 (1958). Likewise, in *Hodel v. Irving*, 481 U.S. 704 (1987), this Court found that plaintiffs had third-party standing to assert the rights of their deceased parents because it was impossible for the parents to assert their own rights.

In the context of abortion, the presumption against third party standing continues to apply, and litigants are generally required to represent only their own interests: "'Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party.'" *Singleton*, 428 U.S. at 113 (*quoting Barrows*, 346 U.S. at 255). In abortion litigation, "third parties themselves usually will be the best proponents of their own rights." *Singleton*, 428 U.S. at 114

Nevertheless, third party standing has been granted to abortion providers to represent women seeking abortion. In this case, the Court of Appeals relied on this Court's decisions in *Singleton*, 428 U.S. at 117-18, and *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976), in support of granting the abortion providers third party standing here. Petition for Writ of Certiorari at App. 5, n. 2.

Singleton, however, involved a suit in which abortion providers sought to represent those seeking public financial assistance to pay the abortion providers for their services. 428 U.S. at 108. The abortion providers were themselves clearly harmed if they were not paid, there was no potential conflict of interests between the providers and the women seeking public assistance, and the case did not involve a challenge to a statute to determine whether the women involved could even consent to abortion in the first place.

The *Danforth* Court did not hold that the plaintiffs in that case had third party standing to represent minors, but rather that they had themselves "assert[ed] a sufficiently direct threat of personal detriment," 428 U.S. at 62, to provide them standing on their own behalf, presumably because the plaintiffs themselves could be penalized under the Missouri statute at issue there for performing abortion on any minor without parental consent.

Moreover, *Danforth* specifically denied physician abortion providers in that case standing to challenge a portion of the Act that related to the wardship of a live-born infant because the provision did not "impose any obligation on them" or otherwise "injure[] them in fact," and they did not have "any interest in the question of who receives custody that is 'sufficiently concrete' to satisfy the 'case or controversy' requirement of a federal court's Art. III jurisdiction." *Id.* at 62 n. 2 (*citing Singleton*, 428 U.S. at 112). The proceedings contemplated by the Act are closely analogous to the custody matter at issue in *Danforth* in that they amount to a hearing for determination whether the minor is sufficiently mature to be deemed in her own custody and control for the purpose of an abortion decision or whether the court or minors' parents will make or assist in making abortion decisions for her. From this perspective, *Danforth* provides clear precedent to the effect that the abortion providers here have no interest at stake in the proceedings to render them eligible to represent minors in challenging their constitutional parameters.

In *Bellotti v. Baird*, 443 U.S. 622 (1979), a minor was present to represent the "class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent [to abortion], and who do not wish to involve their parents." *Baird v. Bellotti*, 393 F. Supp. 847, 850 (Mass. 1975). As this Court noted, "Initially there was some confusion whether the rights of minors who wish abortions without

parental involvement but who lack 'adequate capacity' to give such consent also could be adjudicated in the suit. The District Court ultimately determined that [abortion provider] Dr. Zupnick was entitled to assert the rights of these minors. See *Baird v. Bellotti*, 450 F. Supp. 997, 1001, and n. 6 (Mass. 1978)." *Bellotti*, 443 U.S. at 626-27. However, this Court never specifically addressed the constitutional propriety of this, noting only that it was "apparent from the District Court's opinions" that it considered the constitutionality of the Massachusetts parental consent statute "as applied to all pregnant minors whom might be affected by it," and that the this Court "accept[ed] that the rights of this entire category of minors properly were subject to adjudication." *Id.* at 627 n. 5. Thus, the most that can be said of *Bellotti*, if it represents a meaningful precedent on third party standing of abortion providers to represent minors at all, is only that abortion providers may represent "immature minors." But here, the abortion providers claim to represent *all* minors in the context of this litigation, even those who might properly make their own abortion decisions.

Hodgson v. Minnesota, 497 U.S. 417 (1990), involved a challenge to a statute that required a 48-hour waiting period and notification to both parents before an abortion could be performed on a minor. But "six pregnant minors representing a class of pregnant minors" were among those who brought the case, *id.* at 427, so third party representation of the minors was not at issue. Similarly, in *H.L. v. Matheson*, 450 U.S. 398 (1981), which involved a challenge to a parental notification statute, the plaintiff was herself a pregnant unmarried 15-year-old living with her parents, so third party standing by an abortion provider was not itself directly at issue.[3] Based on *H.L.*, the

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[3]Notably, however, since the minor plaintiff H.L. did not allege or offer evidence that either she or any member of her class was mature or (continued...)

Sixth Circuit court in *Akron Center for Reproductive Health, Inc. v. City of Akron,* 651 F.2d 1198 (6th Cir.1981), stated that the constitutionality of a notification statute as applied to mature minors could not be decided because abortion clinics and a physician were challenging the provision, not a mature minor.[4] *Id.* at 1205-6.

In sum, there is no direct precedent governing whether abortion providers should properly be granted third party standing to represent minors in challenging a law providing procedures to determine whether minors are sufficiently mature to make their own decisions with regard to abortion or whether the decision should be made by a court or in consultation with parents. As Storer will now show, however, the reasoning of the Court's general precedents dictates that third party standing should not be granted to abortion providers in challenging the

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[3](...continued)
emancipated, this Court held that she lacked standing to challenge the Utah statute as being unconstitutional on its face on the ground of overbreadth in that the statute could be construed to apply to all unmarried minor girls, including those who are mature and emancipated. *Id.* at 406. The Court then held that the Utah parental notice law unconstitutional as applied to the minor, H.L. *Id.* at 413.

In purporting to represent all minors in a facial attack on the New Hampshire Act here, the abortion providers similarly fail to specifically allege that they treat both mature and immature minors or that any minor they treat or have treated have encounter the need for a "prompt" health abortion or that the Act's life exception would be inadequate to preserve the life of any minor that they treat or have treated. In this regard, their allegations themselves lack the concrete specificity rooted in a real case or controversy necessary for Article III standing.

[4]The Sixth Circuit's ruling on that provision was not appealed to nor reviewed by this Court in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

lack of a blanket health exception to the Act or the adequacy of its life exception and confidentiality provisions.

C. *Specific Criteria for Permitting Third Party Standing Are Not Met in this Case.*

1. The Abortion Providers Should Be Denied Third Party Standing to Challenge the Act's Lack of a Blanket Health Exception on Behalf of Minors.

The abortion providers' claim against the Act made on behalf of minor women for "failing to allow prompt abortions necessary to protect the [minor] woman's health," Complaint, ¶ 31(a), fails to satisfy the specialized criteria for *jus tertii* standing for two reasons.

First, the abortion providers fail the threshold requirement that they be allowed standing to litigate the rights of third party minors only "when enforcement of the challenged restriction against the [abortion providers] would result indirectly in the violation of [minors]' rights." *Warth*, 422 U.S. at 510. No doubt, the lack of a blanket health exception would render the abortion providers liable under the Act for performing abortions for "health" reasons on minors without parental notice or securing court authority to do so, thereby depriving some minors of any putative right to a health abortion.

However, performing such abortions on those minors who are too immature to decide for abortion, or for whom abortion is not in their best interests would directly violate these minors' rights to bodily integrity and to carry their children to term. Arguably, the abortion providers might legitimately represent mature minors seeking abortion. But this begs one of the very questions that the Act seeks to answer: Who is a mature minor, when all unemancipated minors are presumed immature without some court determination otherwise? Thus, without such

determinations as the Act itself provides, the Act cannot be said to violate or protect a particular right of any particular minor. So the injury claimed by the abortion proponents lacks the concreteness and specificity necessary to provide them standing.

Second, and more obviously, it cannot be said that there is a "close" relationship between abortion providers and minors such that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton*, 428 U.S. at 114-15. The right of the minor placed at issue by the Act is not the minor's right to *secure* an abortion once competently decided upon, but the minor's right to *decide* (or have a best interests decision made for her) whether to have an abortion *or* to give birth – and abortion providers are only effective proponents of the former proposition.

That the right claimed on behalf of the minor is a right to a "prompt" abortion for "health" reasons makes no difference. If, as the Act provides, the minor is deemed mature, then she may make a decision whether or not the effect on her health of continued pregnancy is in her own best interests. If she is deemed too immature to make her own decision, then the Act provides that the court will make the decision for her in her best interests – a decision that would surely take into account health consequences. So the Act provides for "health" abortions as a feature of the minor's own decision or the best interests decision of the court.

It is true that the Act does not provide the physician with authority to provide a "prompt" or immediate abortion upon minors without court or parental notice or consent. But the abortion providers' claim in this regard amounts to the naked assertion that minors have a right to immediate abortion without the formal consent of anyone at all, since even the minor herself is legally presumed incapable of consent. That is, their claim

posits a federal constitutional right of implied consent to perform "health" abortion on minors (and, by necessary implication, at least, on adults who have never been competent). Plainly, even if there were such a right, it must be asserted by minors themselves, not by abortion providers who propose to abort them at will any time they detect a colorable health justification to do so. An abortion provider is not, by definition, an impartial or neutral arbiter of minors' capacity to consent to abortion or whether their best interests would necessarily be served by a "prompt" health abortion.

In this regard, it is notable that the abortion providers here do not merely purport to represent minors in securing more expedited proceedings than the Act already provides to determine whether the minor is mature enough to make her own value judgment regarding what health risks, if any, she may wish to bear by continued pregnancy or to evaluate an immature minor's health risks in context of a best interest determination. Instead, relying on *Stenberg v. Carhardt*, 530 U.S. 914, 931 (2000), which was decided in the context of a complete ban on a certain abortion procedure even when a health risk is posed, they seek a *blanket* exemption to the Act. Respondents' Brief in Opposition at 5. They quote *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992), to support striking down the Act for lack of a blanket health exception because "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion . . .if continuing her pregnancy would constitute a threat to her health." Respondents' Brief in Opposition at 5.[5] In effect

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[5]Moreover, the abortion providers evade describing the scope of the definition of "health" that they urge as a blanket exception to the Act. They generally invoke such complications as preeclampsia, eclampsia, premature rupture of the membranes surrounding the fetus, spontaneous choriamnionitis, and heavy bleeding during pregnancy, Complaint, ¶ 25, (continued...)

they thus claim that the delay effected by the Act to assess minors' maturity or best interests is unconstitutional in the face of a health risk because *any* delay interferes with abortion – a conclusion that simply cannot be reconciled with any other analogous precedent of this Court.[6]

Their theory utterly neglects the threshold question of whether a minor is capable of a competent "choice" to undergo an abortion or, if not, whether it is necessarily in her best interest to do so. Many, if not most, competent women would assume some health risk from continued pregnancy given the choice, and it cannot be assumed that all minors would choose otherwise in assessing their best interests. That the abortion providers simply assume otherwise further demonstrates that they are not effective

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[5](...continued)
though they do not specifically allege that they presently treat or have treated any minor in need of an immediate health or life abortion for any particular such reason. Moreover, there is nothing that prevents use of as broad a definition of health as that employed in *Doe v. Bolton*, 420 U.S. 179, 212 (1973), to include any and "all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient." If so, then mere emotional distress or minority age itself might justify short-circuiting the Act.

[6]For example, in *Cruzan v. Director*, 497 U.S. 261 (1990), this Court upheld a Missouri scheme that required court assessment to determine whether there was clear and convincing evidence of a presently incompetent person's wish to forego life-sustaining tube feeding or hydration before they might be withheld or withdrawn from that person – thereby necessarily entailing possible considerable delay and possible attendant suffering in effecting any exercise of the fundamental right to refuse unwanted medical treatment. Yet it cannot be cogently argued that the rights and interests at stake in delaying discontinuation of potentially painful and intrusive medical treatment are any less consequential than those at stake delaying any "health" abortion. In either case, delay is justified to properly assess the nature of the decisional right at issue, given the fundamental rights and values at stake whichever choice is ultimately made.

proponents of the right at issue and should thus be denied third party standing to represent minors in this regard.

2. The Abortion Providers Should Be Denied Third Party Standing to Challenge Adequacy of the Act's Life Exception on Behalf of Minors.

The abortion providers also claim that the "Act deprives plaintiffs' patients of their right to privacy as protected by the Fourteenth Amendment to the United States Constitution by .... failing to provide an adequate emergency exception to protect their lives . . . ." Complaint, ¶ 31 (b). The "life" exception of the Act provides that "no notice shall be required under RSA 132:24 if . . . [t]he attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice. . . ." N.H. Rev. Stat. Ann. § 132:26(I)(a).

The "life" exception deems abortion *per se* in the best interests of minors regardless of the minors' maturity when abortion is deemed necessary to prevent death – obviating the need for and short-circuiting the procedures provided by the Act to determine the maturity of the minor or whether the best interests of the immature minor are served by abortion or parental notice.

Nevertheless, the abortion providers ought not be permitted to challenge the adequacy of the life exception on behalf of minors, even if they may certainly challenge it on their own behalf on account of the potential liability it imposes on them (and assuming that they otherwise satisfy standing requirements). The extent to which the Act deems abortion to be always in a minor's best interest notwithstanding maturity because continued pregnancy may pose a threat to life still

relates to the *decision* for or against abortion, rather than to the *performance* of abortion once decided upon. Abortion providers have no necessary interest in the outcome of such a decision.

A mature minor, after all, has the right to decide to risk life in order to carry her child to term and might have a different judgment on the scope of the risk she would assume in order to do so, and hence the "adequacy" of any life exception. But to grant abortion providers the right to challenge the adequacy of the life exception on behalf of the minors would be based on the implicit and unwarranted assumption that minors would always choose abortion as in their best interests when confronted with a risk to life and would always assess the "adequacy" of the life exception in the same way as they do.

Since the State is making the decision for minor women that abortion without parental notice or assessment of maturity is the minor's best interest because of the risk to life posed by continued pregnancy, then "adequacy" of that decision should be challenged by the minors themselves, with whom the ultimate right to abortion decision making belongs. Because there is no minor plaintiff in this case, the abortion providers' cause of action in this regard should thus be dismissed.

3. The Abortion Providers Should Be Denied Third Party Standing to Challenge the Adequacy of the Act's Confidentiality Provisions on Behalf of Their Minor Patients.

The abortion providers next claim that the "Act deprives plaintiffs' patients of their right to privacy as protected by the Fourteenth Amendment to the United States Constitution by . . . failing to provide a confidential judicial waiver procedure . . . ." Complaint, ¶ 31 (c). They should be denied third party standing to challenge the Act's confidentiality provisions because there is no threat of injury to them posed by any lack of confidentiality

in the procedures contemplated by the Act. They thus fail to satisfy the requirement that third party standing be granted only "when enforcement of the challenged restriction against the [abortion providers] would result indirectly in the violation of [minors]' rights," *Warth*, 422 U.S. at 510, because the confidentiality provisions do not apply to the abortion providers.

The confidentiality provisions of the Act are directed solely to the trial and appellate courts of New Hampshire, stating that the "[p]roceedings in the [trial] court under this section shall be confidential," N.H. Rev. Stat. § 132:26 (II)(b), and "[a]n expedited confidential appeal shall be available to any such pregnant minor for whom the court denied an order authorizing an abortion without notification." *Id.* at § 132:26 (II)(c). They cannot be enforced against the abortion providers at all, and thus they cannot possibly indirectly result in any violation of the minors' rights as the result of enforcement against the providers.

The only enforcement provision in the Act provides that "[p]erformance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for civil action by a person wrongfully denied notification." *Id.* at § 132:27. The confidentiality procedures of the Act potentially affect only the minors who seek court review, who are thus the only legitimate complainants against whatever deficiency in them that might be alleged. Because there is no minor plaintiff in this case who seeks relief of the Act's notification requirement, it follows that this cause of action must be dismissed.

4. The Abortion Providers Should Be Denied Third Party Standing to Challenge Any Chilling Effect On Behalf of their Minor Patients.

Finally, the abortion providers claim that the Act deprives minors of their privacy rights by "chilling the provision of

abortion services by failing to give clear notice of what conduct is prohibited by the Act's terms and placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability." Complaint, ¶ 31 (d). This claim cannot relate to the lack of health exception or confidentiality provisions of the Act at all, since there is no language in the Act that applies to the providers with regard to these aspects of the Act.

Indeed, this aspect of the abortion providers' Complaint appears to do no more than to attempt to incorporate their Second Cause of Action claiming injuries to themselves into their First Cause of Action claiming injuries to minors. *See* this Brief at 2 (Complaint, ¶ 31) and 12 n.2 (Complaint, ¶ 32). So this third party claim is unnecessary to the relief sought, which would be fully secured through their Second Cause of Action, and is superfluous.

Moreov r, it is incoherent: The abortion providers may be "chilled" in erforming abortions because aspects of the Act may be unclear or because some standard of proof is inadequate, but minor women are not. Their access to abortion would be limited or obstructed to the extent that abortion providers are "chilled." The abortion providers should thus be denied third party standing to represent minors in this regard.

D. *There Is No Significant Obstacle to Minors Representing Their Own Interests In Challenging the Lack of a Blanket Health Exception or the Adequacy of the Life Exception and Confidentiality Procedures of the Act.*

In addition to the Article III requirements that the abortion providers must themselves have standing to challenge a statute on behalf of another and that they only be "allowed standing to litigate the rights of third parties when enforcement of the

challenged restriction against the litigant would result indirectly in the violation of third parties' rights," *Warth*, 422 U.S. at 510, as well as the prudential consideration of a "close" relationship between litigant and third party, third party standing should only be granted when it is "difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Barrows*, 346 U.S. at 257.

There have been numerous instances in which minors have been parties in challenging aspects of parental notice and consent statutes similar to the Act. *See, e.g., Hodgson v. Minnesota*, 497 U.S. at 427; *H.L. v. Matheson*, 450 U.S. at 340; *Bellotti v. Baird*, 443 U.S. at 627; *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 854 (6th Cir. 1988); *Margaret S. v. Edward*, 794 F.2d 994, 997 (5th Cir. 1986); *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1131 (7th Cir. 1983). There is no reason that minors could not have also sued here.

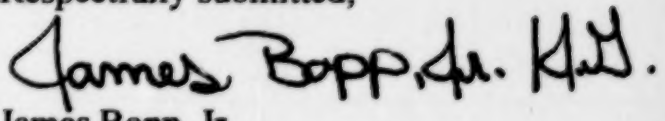
Moreover, the Act itself specifically provides that both a guardian ad litem may be appointed for any minor who is a party to proceedings under the Act and that the "court shall . . . advise her that she has a right to court–appointed counsel, and shall, upon her request, provide her with such counsel." N.H. Rev. Stat. § 132:26 (II)(b). Plainly, therefore, it is not "difficult, if not impossible" for minors to present any particular grievance they may have against the Act "to any court." Third party standing should thus not be provided to the abortion providers on such a basis.

CONCLUSION

On the basis of the foregoing, amicus Horatio R. Storer Foundation, Inc., prays this Court to find that the abortion providers lack third party standing to assert claims on behalf of minors. Their claims relating to the lack of a health exception

in the Act, the Act's confidentiality provisions, the adequacy of the Act's death exception, and the chilling effect of the Act on minors must therefore be dismissed because there is no minor party challenging these aspects of the Act.

Respectfully submitted,



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IN THE

Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND,
CONCORD FEMINIST HEALTH CENTER,
FEMINIST HEALTH CENTER OF PORTSMOUTH, AND
WAYNE GOLDNER, M.D.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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Interest of *Amicus Curiae*[*]

The Thomas More Society is a non-sectarian 501(c)(3) public charity based in Chicago, Illinois, and is incorporated as an Illinois not-for-profit corporation. Founded in 1997, the Thomas More Society was established to help meet the burgeoning legal needs of the pro-life movement and, in particular, to defend those who face legal battles as a result of their commitment to the protection of basic civil rights for the most vulnerable and defenseless members of our society, innocent prenatal human beings. The Thomas More Society provides legal advice and assistance to those who face harassment, employment discrimination, unjust treatment or prosecution as a result of their pro-life position.

Consistent with its mission and the respect for human life which that mission implies, the Thomas More Society opposes abortion and supports parental involvement laws. The New Hampshire Parental Notification Prior to Abortion Act, N.H. REV. STAT. § 132:24 *et seq.* (Supp. 2004), is intended to promote the State's "important and compelling . . . interests of protecting minors against their own immaturity, fostering the family structure and preserving it as a viable social unit, and protecting the rights of parents to rear children who are members of their household." 2003 N.H. Laws, ch. 173:1, § I. The Court has long recognized the legitimacy of these reasons. *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality op.) (referring to "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing"). To assist the Court in addressing the issues presented, *amicus* submits this brief.

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[*] Letters of consent have been filed with the Clerk. None of the counsel for the parties authored this brief in whole or in part, and no one other than *amicus* or its counsel has contributed money or services to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Respondents, three abortion clinics and a physician who performs abortions, challenged the New Hampshire Parental Notification Prior to Abortion Act, N.H. REV. STAT. § 132:24 *et seq*. (Supp. 2004). Respondents' principal claim was that the Act is unconstitutional because it does not contain a medical emergency exception excusing compliance with the law in those circumstances where the delay in performing the abortion could result in serious risk of injury to the pregnant minor's physical health. *See* Complaint, ¶¶ 2, 24-26, 31(a). In a related claim, respondents alleged that the Act is invalid because the exception in Act excusing compliance with the notice requirement when the abortion is "necessary to prevent the minor's death and there is insufficient time to provide the required notice," § 132:26(I)(a), is too narrow. *Id*. ¶¶ 3, 27-29, 31(b). Based on these allegations and the declarations respondents introduced in support of their Motion for Preliminary Injunction, the district court declared the Act unconstitutional on its face and enjoined enforcement of the Act in its entirety. *Planned Parenthood of Northern New England v. Heed*, 296 F.Supp.2d 59 (D. N.H. 2003). The court of appeals affirmed. *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53 (1st Cir. 2004).[1]

The lower court's judgment should be reversed. First, none of the respondents has the requisite standing to challenge the absence of a physical health exception in the Act or the adequacy of the life exception. Even assuming that respondents possess third-party standing to represent the interests of their patients, respondents neither alleged nor proved that they have ever performed medical emergency abortions on pregnant minors in the past. Nor did they allege that they would perform such abortions in the future. Hence, respondents failed to allege and prove the threshold requirement of standing under art. III, § 2, "injury-in-fact." *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998).

Second, assuming that respondents have standing to challenge the Act on behalf of pregnant minor patients who would allegedly need medical emergency abortions, and that a medical emergency exception is constitutionally required, the relief provided by the lower court was overbroad. The Act mandates severance of invalid *applications*, as well as severance of invalid *provisions*. *See* N.H. REV. STAT. § 132:28 (Supp. 2004). Neither the district court nor the court of appeals followed this clear and unambiguous expression of legislative intent. "Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). The failure of either the district court or the court of appeals to limit the scope of the relief provided respondents is particularly egregious when it is considered that virtually no medical emergency abortions are performed on pregnant minors. This is confirmed indirectly by respondents' failure to allege that they have ever performed such abortions and by the failure of other abortion providers to challenge parental laws similar to New Hampshire's, and directly by the overwhelming weight of statistical data available from those States that require physicians to report medical emergency abortions involving pregnant minors. Thus, even assuming that an adequate medical emergency exception is constitutionally required, the lower court should have declared the Act unconstitutional in part, not on its face, and enjoined the Act *only* to the extent that it does not permit medical emergency abortions.

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[1] Neither the district court nor the court of appeals reached respondents' claim, *see* Complaint, ¶¶ 4, 22-23, 31(c), that the Act does not ensure confidentiality of the judicial bypass hearing. With respect to issues not discussed in this Brief, *amicus curiae* generally adopts Petitioner's Brief.

ARGUMENT

I. RESPONDENTS LACK STANDING TO CHALLENGE THE ABSENCE OF A PHYSICAL HEALTH EXCEPTION OR THE ADEQUACY OF THE LIFE EXCEPTION IN NEW HAMPSHIRE'S PARENTAL NOTICE ACT.

Respondents lack standing to challenge either the absence of a physical health exception or the adequacy of the life exception in New Hampshire's parental notice act. Respondents neither alleged nor proved that they perform (or intend to perform) medical emergency abortions on minors. Accordingly, their challenge to the act on those grounds should have been dismissed for lack of standing.

There are three requirements that constitute the "irreducible constitutional minimum of standing" under art. III, § 2:

> First and foremost, there most be alleged (and ultimately proved) an injury in fact–a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. Second, there must be causation–a fairly traceable connection between the plaintiff's injury and the complained-of-conduct of the defendant. And third, there must be redressability–a likelihood that the requested relief will redress the alleged injury. This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-04 (1998) (citations and internal quotation marks omitted). If a plaintiff fails to prove any one of these requirements, a court must dismiss the case for lack of standing. *Id.*

Respondents have failed to allege and prove the first requirement, injury-in-fact, with respect to their claims that the parental notice act is invalid because it has no physical health exception and because the life exception is inadequate. *See* Complaint, ¶¶ 2, 3, 31(a), -(b). Respondents neither alleged nor proved that they had ever had a minor pregnant patient for whom a medical emergency abortion was necessary to preserve her physical health or save her life. Nor did they allege that they would perform a medical emergency abortion if presented with a minor patient for whom such an abortion was, in their view, necessary. Accordingly, their claims should have been dismissed for lack of standing.

Respondents alleged that among their patients are "unemancipated women under the age of eighteen who need abortions." Complaint, ¶¶ 8, 9, 10, 11. Respondents, however, did not specify the reasons for which their patients "need" abortions, nor did they allege that the abortions were necessary because of medical emergencies. Respondents did identify a number of "urgent medical situations that require a prompt abortion to be provided to protect the health of the woman." *Id.*, ¶ 25. Those situations include "premature rupture of the membranes that enclose the pregnancy; pre-eclampsia; and significant bleeding from the uterus in early pregnancy." *Id.* Respondents claimed that for patients with these conditions, "delaying the procedure in order to comply with the parental notification requirements of the statute or for the minor to obtain a court waiver, would pose dangers to the minor's health, including the dangers of infertility, vision loss, chronic pain, or kidney or liver damage." *Id.* Respon-

dents, however, did *not* aver that they had ever had any minor pregnant patients for whom an "urgent medical situation[]" required "a prompt abortion," *id.*, or that they would perform an "urgent medical situation" abortion on a pregnant minor.

Respondents complained further that the statutory exception for an abortion that is "necessary to prevent the minor's death and there is insufficient time to provide the required notice," § 132:26(I)(a), "endangers even those minors in need of life-saving abortions." Complaint, ¶ 27. "[P]hysicians will not be able to rely on this exception," respondents claimed, "[b]ecause a physician cannot accurately predict when a minor's condition has progressed to the point where she will die within the time it takes to comply with the Act's requirements, ..." *Id.* Physicians, therefore, will be required "to use procedures [other than abortion] to stave off death that could cause long term impairment of the minor's health." *Id.*, ¶ 28. As in the case of medical emergency abortions performed to preserve the pregnant minor's physical health, however, respondents did not aver that they had ever had any minor patients for whom a "life-saving abortion[]" was necessary, *id.*, ¶ 27, or that they would perform a "life-saving" abortion on a pregnant minor.

None of the deficiencies in respondents' complaint was cured by their declarations. Dr. Goldner identified a number of conditions that could, in his judgment, require an immediate abortion to avoid serious harm to a pregnant woman's health in certain circumstances. *See* Goldner Declaration, ¶¶ 8-15. Those conditions include preeclampsia; eclampsia; premature rupture of the membranes surrounding the fetus, which may lead to chorioamnionitis (a serious infection of the placental lining) and systemic sepsis; spontaneous chorioamnionitis (unrelated to premature rupture of the membranes); pelvic infections and heavy bleeding from the

uterus. *Id.* Although Dr. Goldner has been performing abortions for more than twenty years (*id.*, at ¶ 2), he did *not* aver that he had ever had a minor patient for whom a medical emergency abortion was necessary for any of these reasons. Nor, despite his dissatisfaction with the life exception in the statute, *see id.*, ¶¶ 16-19, did he aver that he had ever had a minor patient for whom a medical emergency abortion was necessary to save her life. Dr. Goldner did not state that, apart from the law, he would perform a medical emergency abortion on a minor to preserve her life or physical health.

Rachel Atkins is the Vice-President for Medical Services for Planned Parenthood of Northern New England and a physician's assistant. As a physician's assistant, Ms. Atkins performed first-trimester abortions for fifteen years (from 1981 to 1995), apparently in Vermont. Atkins Declaration, ¶ 3. Since 1987, she has supervised the provision of medical services, including abortions, first at the Vermont Women's Health Center and later at Planned Parenthood of Northern New England. *Id.* Ms. Atkins complained of the statute's lack of a medical emergency exception because, in her view, delay in obtaining the abortion "to comply with the notice requirements or to get a judicial bypass would seriously threaten a young woman's health" in certain circumstances. *Id.*, ¶ 10. Despite her experience as a physician's assistant in performing abortions and as an administrator in managing the provision of abortion services, Ms. Atkins did *not* aver that she had ever had or even known of a minor patient for whom a medical emergency abortion was necessary (respondents' third declarant was an attorney who submitted a declaration regarding the operation of judicial bypass hearings).

It is apparent from an examination of respondents' complaint and their declarations that they lack standing to challenge the absence of a health exception or the adequacy

of the life exception in New Hampshire's parental notice statute. Neither in their complaint nor in their declarations did respondents claim that they have ever had minor patients for whom a medical emergency abortion was necessary or that they would even perform such abortions.[2] Their claims should have been dismissed for lack of standing.[3]

Article III, § 2's "case or controversy" requirement applies to abortion cases no less than other cases. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court affirmed the dismissal, for lack of standing, of a childless married couple's challenge to the Texas abortion statutes where the wife was not pregnant and had no present intention of becoming pregnant. The couple claimed that, in the event of contraceptive failure, the wife might become pregnant and, at that time, might want to obtain an abortion that would be illegal under Texas law. 410 U.S. at 128. The Court found that the couple's claim was "speculative." "Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Anyone or more of these several possibilities may not take place and all may not combine." *Id.* The Court held that the "bare allegation" that "these possibilities might have some real or imagined impact upon their marital happiness" was simply too "indirect an injury . . . to present

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[2] Emergency abortions normally would be performed in a hospital, not a clinic, yet, no hospital is a party to this case. Respondents neither alleged nor proved that they treat or intend to treat pregnant minor patients with any of the conditions described by Dr. Goldner.

[3] Nothing in the Court's analysis of the definition of the medical emergency exception in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), relieves respondents of their obligation to allege and prove "injury-in-fact" here. In *Casey*, the plaintiffs' standing to challenge the adequacy of the medical emergency definition was not challenged.

an actual case or controversy." *Id.* So too, in the case at bar, it is utterly speculative whether any of the respondents will ever be confronted with a medical emergency abortion.

Again, in *Harris v. McRae*, 448 U.S. 297 (1980), the Court refused to reach the merits of a free exercise of religion challenge to the Hyde Amendment (restricting federal funding of abortion) brought by, *inter alia*, two women who "failed to allege either that they are or expect to be pregnant or that they are eligible to receive Medicaid." 448 U.S. at 320. These plaintiffs, the Court held, "lack the personal stake in the controversy needed to confer standing to raise such a challenge to the Hyde Amendment." *Id.* Finally, in *H.L. v. Matheson*, 450 U.S. 398 (1981), the Court held that a pregnant minor lacked standing to challenge a parental notice statute as overbroad, "in that it [could] be construed to apply to all unmarried minor girls, including those who are mature and emancipated," where the minor "did not allege or proffer any evidence that either she or any member of her class [was] mature or emancipated." *Id.* at 405-06.

The reasoning of the foregoing cases is directly applicable to the present case. Respondents did not allege or prove that they perform (or even intend to perform) medical emergency abortions on pregnant minor patients. In the absence of proof that respondents perform (or intend to perform) such abortions, their expressed concerns about the impact of the statute on the lives and health of pregnant minors are entirely speculative. There is certainly no "injury-in-fact," *i.e.*, " harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical." *Steel Co. v. Citizens for a Better Environment*, *supra*, 523

U.S. at 103.[4]

The speculative nature of respondents' claims is underscored by the dearth of evidence that medical emergency abortions are performed on pregnant minors, either in States without such exceptions or in States with such exceptions.

States without Medical Emergency Exceptions

At least four States–Arkansas, Minnesota, Missouri and North Dakota–have parental notice or consent laws on the books which are in force and which do *not* contain a medical emergency exception (other than, in the case of Arkansas, Minnesota and North Dakota, the life of the

[4] The court of appeals dismissed the concerns raised about respondents' standing in a footnote. *See* 390 F.3d at 56 n.2. The lower court, however, failed to recognize that neither Dr. Goldner nor the respondent clinics perform (or express an interest in performing) medical emergency abortions on pregnant minors. Contrary to the implications of the lower court's standing analysis, the mere ability to hypothesize circumstances under which a medical emergency abortion might be necessary does not confer standing on *these* respondents to challenge the absence of a physical health exception and the adequacy of the life exception in the New Hampshire parental notice act. That is because respondents do not perform (or intend to perform) medical emergency abortions. In determining that respondents possess the standing necessary to challenge the New Hampshire parental notice law on these grounds, the lower court ignored its own precedent. In *Rodos v. Michaelson*, 527 F.2d 582 (1st Cir. 1975), the First Circuit held that physicians who had no interest in performing abortions beyond the nineteenth or twentieth week of pregnancy lacked standing to challenge a statute that, by its terms, restricted abortions only after viability which, at the earliest, occurs at the twenty-third week of pregnancy. To allow the physicians' challenge to proceed, based on their unreasonable "fear" of the "chilling effect" the statute might have on their practice, would "emasculate[] principles of standing." 527 F.2d at 585.

mother).[5] The Court upheld Minnesota's parental notice statute (subject to a judicial bypass procedure) in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), and Missouri's parental consent statute in *Planned Parenthood of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 490-93 (1983). Notwithstanding the absence of a medical emergency exception excusing compliance with the law for reasons relating to the mother's health, none of these statutes has been declared unconstitutional on this ground and, with the possible exception of the Minnesota statute, none has even been challenged on this basis. This is of particular significance when it is considered that the Arkansas and Minnesota laws have been in effect for more than fifteen years, and the Missouri and North Dakota laws for more than twenty years. That these laws have been in force for so many years without even an as-applied challenge strongly suggests that medical emergency abortions are seldom, if ever, performed on pregnant minors.

States with Medical Emergency Exceptions

In contrast to Arkansas, Minnesota, Missouri and North Dakota, most States that have enacted parental notice or consent statutes make exceptions for medical emergencies

[5] *See* ARK. CODE ANN. § 20-16-801 *et seq.* (Michie 2000) (two-parent notice); MINN. STAT. ANN. § 144.343 (West Supp. 2005) (two-parent notice); MO. ANN. STAT. § 188.028 (West 2004) (one-parent consent); N.D. CENT. CODE § 14-02.1-03.1 (2004) (one-parent consent). Compliance with the requirements of the Arkansas, Minnesota and North Dakota statutes is excused in emergency situations where the life of the pregnant minor would be endangered by delay in performing the abortion. *See* ARK. CODE ANN. § 20-16-805(1); MINN. STAT. ANN. § 144.343, subd. 4(a) (West Supp. 2005); N.D. CENT. CODE § 14-02.1-03.1(12). The Arkansas statute has been amended recently to require parental consent, as opposed to notice, and to include a Pennsylvania-style medical emergency exception. *See* 2005 ARK. ACTS 537.

which include both the life of the mother and her health (variously defined). Although the majority of these States do not require physicians to identify medical emergencies on the reporting forms they are required to submit to state public health departments, a minority of them do and the statistical data available from these States provides compelling evidence that medical emergency abortions are almost never performed on pregnant minors.

Alabama

Alabama enacted its parental consent statute in 1987. *See* ALA. CODE, § 26-21-1 *et seq*. (1992). The statute, which requires the consent of one parent (or the legal guardian) of an unemancipated minor under the age of 18 years before an abortion may be performed on her, does not apply "when, in the best clinical judgment of the attending physician on the facts of the case before him, a medical emergency exists that so compromises the health, safety or well-being of the mother as to require an immediate abortion." *Id*. § 26-21-5. "A physician who does not comply with [the parental consent requirement] by reason of this exception shall state in the medical record of the abortion, the medical indications on which his judgment was based." *Id*. Medical emergency abortions must be reported to the Bureau of Vital Statistics. *Id*. § 26-21-8(c)(3).

Between 1988, the first full year the parental consent laws was in effect, and 2003, the last year for which data is available, more than 20,000 abortions were performed on minors in Alabama. In eight of those sixteen years, including the last four years (2000-2003), not a single medical emergency was reported (out of 9,613 abortions performed on minors). In each of seven other years, there was only one reported medical emergency (out of 9,893 abortions), and in

one year (1999), there were two (out of 1,045 abortions).[6]

Idaho

Idaho enacted a parental consent statute in 2000. *See* IDAHO CODE § 18-609A (2004). The statute requires the consent of one parent (or the legal guardian) of an unemancipated minor before an abortion may be performed on her unless, *inter alia*, "[a] medical emergency exists for the minor so urgent that there is insufficient time for the physician to obtain the informed consent of a parent or court order and the attending physician certifies such in the pregnant minor's medical records." *Id*. 18-609A(1)(a)(v).[7] Under the statute as originally enacted, a "medical emergency," for purposes of this exception, meant "a sudden and unexpected physical condition which, in the reasonable medical judgment of any ordinarily prudent physician acting under the circumstances and conditions then existing, is abnormal and so complicates the medical condition of the pregnant minor as to necessitate the immediate causing or performing of an abortion: 1. To prevent her death; or 2. Because delay in causing or perform-

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[6] *See* Alabama Department of Public Health, Bureau of Vital Statistics, Selected Induced Termination of Pregnancy Data: Women Under 18 Years of Age, Alabama, January-December, 1988, Final Data; Alabama Department of Public Health, Center for Health Statistics, Selected Induced Termination of Pregnancy Data: Women Under 18 Years of Age, Alabama, Final Occurrence Data, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997; Alabama Department of Public Health, Center for Health Statistics, Induced Terminations of Pregnancy Occurring in Alabama, 1998, 1999, 2000, 2001, 2002 & 2003. The data for 2001-2003 may also be found at the Center for Health Statistics' website http://ph.state.al.us/chs/Health.

[7] A "minor" is defined as "a woman less than eighteen (18) years of age." *Id*. § 18-609A(5)(d).

ing an abortion will create serious risk of immediate, substantial and irreversible impairment of a major physical bodily function of the patient." *Id.* § 18-609A(5)(c)(i).[8]

Under the Idaho statute, the vital statistics unit of the Department of Health & Welfare is mandated to require "complete and accurate reporting of information relevant to each abortion performed upon a minor which shall include," *inter alia*, "[t]he professional judgment of the attending physician that the performance of the abortion was immediately necessary due to a medical emergency and there was insufficient time to obtain consent from a parent or a court order." *Id.* § 18-609A(4)(a)(i)(5). That information, in turn, is available to the public (without disclosure of any details that could lead to the identification of the patient). *See* §§ 18-609A(4)(a), 39-261 (2002).[9]

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[8] The term "medical emergency" did not include "1. Any physical condition that would be expected to occur in normal pregnancies of woman of similar age, physical condition and gestation; or 2. Any condition that is predominantly psychological or psychiatric in nature." *Id.* § 18-609A(5)(c)(ii). The definition of "medical emergency" was declared unconstitutional in *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 924-35 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 1694 (2005), and was later amended. *See* 2005 Idaho Sess. Laws ch. 393, § 2. The district court had interpreted the definition to be consistent with the medical emergency definition upheld in *Planned Parenthood v. Casey*, *see* p. 8, n. 3, *supra*, and "[o]n this basis, upheld the emergency provision in its entirety." *Wasden*, 376 F.3d at 915. The medical emergency definition under the original law was in force until the Ninth Circuit's decision on July 16, 2004.

[9] Rule 201 of the Federal Rules of Evidence permits a court to take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b)(2). Judicial notice may be taken "at any stage of the proceedings," FED. R. EVID. 201(f), including on appeal. *See United States v. Gonzalez*, 442 F.2d 698, 708 n. 8 (2d Cir. 1971) (*en banc*), *cert. denied*, 404 U.S. 845 (1971) (taking judicial notice on appeal of Department of Narcotics and Dangerous Drugs reports on the thefts of legally possessed cocaine). In *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1064 n. 7 (9th Cir. 1998), the Ninth Circuit took judicial notice on appeal of public records of the state department of health, which is precisely the nature of the data *amicus* brings to the Court's attention in this Brief. In *Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1050 (1986), the First Circuit took judicial notice of census data and health statistics, including abortion reporting data, for the first time on appeal. *Id.* at 998-99 & nn. 4-16. Documents authenticating data discussed in the Brief that are not available in official publications of state health departments or on their websites are included in the appendices.

From October 1, 2000, through December 2003 (the most recent date for which final data is available), 193 abortions were performed on minors (women under 18 years of age). None of those abortions was performed because of a medical emergency. Preliminary data indicates that 69 abortions were performed on minors during 2004, none of which was performed because of a medical emergency. Thus, for the entire period of time for which data is available (October 1, 2000, through December 31, 2004), there was not a single report of a medical emergency abortion having been performed on a minor in Idaho.[10]

Nebraska

Nebraska enacted a parental notice statute in 1991. *See* NEB. REV. STAT. § 71-6901 *et seq.* (2001). The statute requires notification of one parent (or the legal guardian) of a "pregnant woman" before an abortion may be performed on

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[10] *See* Appendix A.

her. *Id.* § 71-6902[11] Notification is not required, however, if "[t]he attending physician certifies in writing that continuation of the pregnancy provides an immediate threat and grave risk to the life or health of the pregnant woman and there is insufficient time to provide the required notification." *Id.* § 71-6906(1).

Although Nebraska does not require reporting of medical emergencies excusing compliance with the parental notice statute, it does require reporting of medical emergencies excusing compliance with the informed consent statute. *See* NEB. REV. STAT § 28-327 (2003). Compliance with the informed consent statute is excused in the case of an "emergency situation," *id.* § 28-327, which is defined as "that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial impairment of a major bodily function." *Id.* § 28-326(7).[12] Because the definition of "emergency situation" in the informed consent statute is narrower than the definition of "medical emergency" in the parental notice statute, any "emergency situation" that would excuse compliance with the former statute would necessarily

[11] A "pregnant woman" is defined, in relevant part, as "an unemancipated woman under eighteen years of age who is pregnant." *Id.* § 71-6901(5).

[12] This definition was adopted in 1993, following the Court's decision in *Planned Parenthood v. Casey*, *see* p. 8, n. 3, *supra*. *See* 1993 NEB. LAWS 274 (LB 110, § 1). Prior to 1993, an "emergency situation" meant "a condition exists that in the sound medical judgment of the physician the abortion should be performed without delay so as not to adversely affect the best physical or mental health of the woman." *Id.* (deleted text).

excuse compliance with the latter. The Nebraska Health and Human Services System requires physicians to report "[w]hether an emergency situation caused the physician to waive any of the requirements of section 28-327." *Id.* § 28-343(10) (2003).

From 1991, when the parental notice statute was enacted, through 2004, more than 5,500 abortions were performed on minors (women under the age of 18) in Nebraska.[13] During that fourteen-year period, only two "emergency situation" abortions (as defined by the informed consent law) were performed on women under the age of 18, one each in 1997 and 1998. For the other twelve years, including the last six years (1999-2004), not one "emergency situation" abortion was reported (out of 4,605 abortions performed on minors).[14]

South Carolina

South Carolina enacted a parental consent statute in 1990. *See* S.C. CODE ANN § 44-41-31 *et seq.* (Law. Co-op. 2002). The statute requires the consent of one parent (or the legal guardian, a grandparent or a person who has acted *in loco parentis*) of an unemancipated minor before an abortion may be performed on her. *Id.* § 44-41-31.[15] Another statute waives the consent requirement if "a physician determines

[13] *See* Nebraska Health and Human Services System, Statistical Report of Abortions, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004. The data for abortions performed on minors is derived from Table 8 (page five) of each report.

[14] *See* Appendix B.

[15] A "minor" is defined as "a female under the age of seventeen." *Id.*, § 44-41-10(m).

that a medical emergency exists involving the life of or grave physical injury to the pregnant woman." *Id.* § 44-41-30(C)(1). Where a medical emergency exists, the physician performing the abortion must indicate on the reporting form the "circumstances waiving consent." *Id.* § 44-41-60.

Since 1997, South Carolina has required physicians to report to the Department of Health and Environmental Control any abortion performed on a minor where compliance with the parental consent law was waived because of a medical emergency. From 1997 through 2003 (the last full year for which statistics are currently available), 2,354 abortions were performed on minors. Not one of those abortions was performed because of a reported medical emergency.[16]

Texas

Texas enacted a parental notice statute that went into effect on January 1, 2000. *See* TEX. FAM. CODE § 33.001 *et seq.* (West 2002). The statute requires notice to one parent (or the legal guardian) of an unemancipated minor before an abortion may be performed on her. *Id.* § 33.002.[17] Notice is not required, however, if "the physician performing the abortion . . . concludes that on the basis of the physician's good faith clinical judgment, a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial and irreversible impairment of a major bodily function." *Id.* § 33.002(a)(4)(A). In such

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[16] *See* Appendix C.

[17] An "unemancipated minor" includes a minor who is not married and who has not had the disabilities of minority removed. TEX. FAM. CODE § 33.001(5).

cases, the attending physician must certify in writing to the Texas Department of Health and in the patient's medical record "the medical indications supporting the physician's judgment that the circumstances described by Paragraph (A) exist." *Id.* § 33.002(a)(4)(B).

Between January 1, 2000, and December 31, 2003, 14,471 abortions were performed on minors.[18] Although data on the numbers of abortions performed on minors in 2004 and 2005 to date is not yet available, it is reasonable to assume that a comparable number of abortions were performed in 2004 as the average number of abortions performed from 2001 through 2003 (approximately 3,550 per year),[19] and half that many during the first six months of 2005 (1,775). Thus, between January 1, 2000, and the end of June 2005, almost 20,000 abortions were performed on minors in Texas. During that five and one-half year period, the Texas Department of State Health Statistics "received *no* Emergency Induced Abortion Certification forms from Texas physicians for reporting years 2000-2005 (to date)."[20]

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[18] *See* Texas Department of Health (now the Texas Department of State Health Services), Texas Vital Statistics, 2000, at 258; *id.*, 2001, at 258; *id.*, 2002, at 258. The preliminary data for 2003 may be found at http://www.tdh.state.tx.us/ chs/vstat/vs03/t33.htm.

[19] In estimating the number of abortions performed on minors in 2004 and the first half of 2005, *amicus* has averaged the number of abortions performed on minors for the three years period 2001 to 2003, and has excluded the number performed in 2000 because that number (3,830) was significantly higher than the highest number of abortions performed in the following three year period (3,573).

[20] Letter of June 28, 2005, from Marc Allen Connelly, Assistant General Counsel, Texas Department of State Health Services, to Joseph Pojman, Ph.D., Executive Director, Texas Alliance for Life (emphasis added). *See* Appendix D.

Wisconsin

Wisconsin enacted its parental consent statute in 1991. *See* WIS. STAT. ANN. § 48.375 (West 2003). The statute requires the consent of one parent (or the legal guardian or a grandparent, sibling or aunt or uncle) of an unemancipated minor before an abortion may be performed on her. *Id.* § 48.375(4)(a).[21] The consent requirement does not apply, however, "if the person who intends to perform or induce the abortion is a physician" and the physician believes, "to the best of his or her medical judgment based on the facts of the case before him or her, that a medical emergency exists that complicates the pregnancy so as to require an immediate abortion." *Id.* § 48.375(4)(b)(1). Medical emergencies must be reported to the Department of Health. *Id.* § 69.186(1)(j) (West 2003). The Department, in turn, is required "to publish annual demographic summaries of the information obtained under this section, ..." *Id.* § 69.186(2).

Since 1998, Wisconsin has required physicians performing abortions to indicate the reason for which consent was not legally required in any given case. Between 1998 and 2004, a period of seven years, 5,307 abortions were performed on minors.[22] Only two of those, both in 2001, were

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[21] A "minor" is defined as "a person who has not attained the age of 18 years, ..." *Id.*, § 990.01(20) (West Supp. 2004).

[22] *See* Reported Induced Abortions in Wisconsin 1998, p. 9, Table 4; 1999, p. 9, Table 4; 2000, p. 9, Table 4; 2001, p. 9, Table 4; 2002, p. 9, Table 4; 2003, p. 9, Table 4; and 2004, p. 6, Table 4. The first four reports (1998-2001) were published in printed form by the Bureau of Health Information, Division of Health Care Financing, Department of Health & Family Services. The last three reports (2002-2004) are available on the Department's website, http://www.dhfs.wisconsin.gov/stats/itop.htm.

performed because of a medical emergency that required an immediate abortion. There have been no reported medical emergency abortions performed on minors in any of the last three years for which data is available (2002-2004).

It is apparent from the foregoing statistical data that medical emergency abortions involving minors are so rare as to be almost non-existent. *No* medical emergency abortions have been reported in the last four years in Alabama, the last six years in Nebraska, the last three years in Wisconsin, or at any time under the Idaho (four years), South Carolina (seven years) and Texas (five and one-half years) statutes since physicians have been required to report emergency abortions. Almost *30,000* abortions were performed on minors in these six States during these years without even *one* reported medical emergency. There is no reason to believe that the experience in New Hampshire, a sparsely populated small State, would be any different. A federal court should not invalidate a state statute on its face "based on a worst case scenario that may never occur." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) (refusing to invalidate a parental notice statute based on speculation as to how long a judicial bypass hearing and appeal might take in certain circumstances).[23] Yet, that is precisely what the court of appeals, in affirming the district court, did in this case.[24]

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[23] *See also Webster v. Reproductive Health Services*, 492 U.S. 490, 523-24 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (in a facial challenge to a statute prohibiting the use of public facilities for the performance of abortions, the Court need not decide whether some "conceivable [but remote] applications of the ban would be unconstitutional where the ban clearly had some quite straightforward applications [that] would be constitutional").

[24] In *Stenberg. v. Carhart*, 530 U.S. 914 (2000), the Court struck down Nebraska's attempt to prohibit a rarely used abortion

Respondents lack standing to challenge the absence of a physical health exception and the adequacy of the life exception in the New Hampshire parental notice law. Accordingly, the lower court's judgment invalidating the law on those grounds must be reversed and the cause remanded with directions to dismiss respondents' claims for lack of standing.

II. ASSUMING THAT THE NEW HAMPSHIRE PARENTAL NOTICE ACT REQUIRES A MEDICAL EMERGENCY EXCEPTION, THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S INJUNCTION ENJOINING THE ACT IN ITS ENTIRETY WHERE A MORE LIMITED INJUNCTION WOULD HAVE CURED THE ACT'S ALLEGED CONSTITUTIONAL INFIRMITIES.

Assuming that respondents have standing to challenge the New Hampshire parental notice act and that the Court further determines that the Act is otherwise invalid without a medical emergency exception that excuses compliance with the notice requirement where delay in performing the abortion would seriously jeopardize the pregnant's minor physical health or her life, then *amicus* submits that the lower courts should have entered a more limited declaration of unconstitutionality and issued a narrower injunction, consistent with the express severability language of the act.

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technique (partial-birth abortion or intact D & E). Unlike the case at bar, however, where there is *no* evidence that respondents ever perform medical emergency abortions, the physician who challenged the Nebraska statute actually performed the banned procedure ten to twenty times per year. *Id.* at 928-29 (citing trial testimony). The constitutional challenge in *Carhart* was not theoretical; the challenge here is.

"Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Would the New Hampshire legislature have passed the parental notice statute if it had known that the statute could not be applied in a few, extremely rare cases where the delay caused by compliance with the law would jeopardize the minor's physical health? The answer, as the statute itself clearly states, is unquestionably yes.

The parental notification act contains a comprehensive severability provision:

> If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications, and to this end, the provisions of this subdivision are severable.

N.H. REV. STAT. § 132:28 (Supp. 2004).

This provision "restates and affirms the unwritten law" that "the invalidity of any part of [an act] shall not destroy the act as a whole if its general purpose can be carried into effect, notwithstanding such invalidity." *Op. of the Justices*, 190 A. 425, 430 (N.H. 1937). Section 132:28, by its express terms, allows severance of invalid *applications*, as well as invalid *provisions*. Even in the absence of such language, the New Hampshire Supreme Court has recognized that unconstitutional *applications* of a statute may be severed. *See Op. of the Justices*, 190 A. 801, 806 (N.H. 1937) (although "some specified details or applications of [a proposed] bill" might be objected to an constitutional grounds, the

unconstitutionality of such applications "would not invalidate the act in its entirety if its general purpose can still be given effect"); *Woolf v. Fuller*, 174 A. 193, 199 (N.H. 1934) (noting "principle of construction that when a statute . . . is valid in some of its applications, but not in others, it is to be read as though the latter were excepted from its operation") (invalidating statute regulating itinerant vendors as it applied to new, as opposed to established, storekeepers"); *Aldrich v. Wright*, 53 N.H. 398, 399 (1873) (statute prohibiting the destruction of certain fur-bearing animals between May 1st and October 15th could not be constitutionally applied to a landowner who killed minks to protect his geese).[25]

The district court, focusing on the statutory language related to invalid *provisions*, as opposed to invalid *applications*, held that "[t]he lack of a health exception renders the entire Act unconstitutional and, therefore, severing *parts* would not remedy that deficiency." 296 F.Supp.2d 59, 67 (D. N.H. 2003) (emphasis added).[26] The court, however, ignored the statutory mandate that invalid *applications* be severed, as well as invalid *provisions*. When that mandate is followed, as it should be, it is clear that the parental notice act may be constitutionally enforced in virtually all of its applications.

In *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996), the Court reaffirmed the well-established principle "'that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.'" *Id.* at 476, quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). In *Brockett*, the Court stated that "the normal rule" is that "partial, rather than facial, invalidation is the required course." 472 U.S. at 504. This is the "required course," not only with respect to severance of unconstitutional *provisions*, but also with respect to severance of unconstitutional *applications*. *See Connecticut v. Menillo*, 423 U.S. 9 (1975) (statute that prohibited "any person" from performing an abortion that was not "necessary to preserve [the woman's life]" could be constitutionally enforced against a non-physician).

Thus, in *Brockett*, a state obscenity statute prohibiting both protected and unprotected speech was struck down only in its invalid applications, specifically, the extent to which the word "lust" in the statute could be applied to those materials which elicited a "normal interest in sex." 472 U.S. at 501-05. Similarly, in *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court held that a state statute authorizing the use of deadly force against fleeing suspects was unconstitutional, not on its face, but only insofar as it authorized the use of lethal force against unarmed and nonviolent suspects. 471 U.S. at 11-12.

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[25] The statutory and case law preference for severance of invalid applications has obvious affinities with the rule of constitutional avoidance, which New Hampshire also follows. *See Op. of the Justices*, 41 N.H. 553, 555 (1861) (referring to the "universally adopted" rule of construction "that when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom, or cases in which, it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intent to violate the constitution"); *see also Cheshire County Tel. Co., v. State*, 63 N.H. 167, 169 (1884) (same); *State v. Cox*, 16 A.2d 508, 513 (N.H. 1940) (same). The doctrine of "constitutional avoidance," although not directly applicable here, reinforces the principle that under New Hampshire law, the constitutional applications of a statute should be preserved whenever possible.

[26] In affirming the district court, the court of appeals did not address the severability issue.

And in *United States v. Grace*, 461 U.S. 171 (1983), the Court accepted the argument that a federal statute prohibiting demonstrations on the Supreme Court grounds could not be applied to picketing on the public sidewalks surrounding the building, but rejected the argument that the statute was invalid on its face. 461 U.S. at 174-75, 183. Finally, in *Marsh v. Alabama*, 326 U.S. 501, 509 (1946), the Court struck down a state trespass law only "[i]nsofar as the State has attempted to impose criminal punishment" on those distributing religious literature on the streets of a company town. *See also Cantwell v. Connecticut*, 310 U.S. 296, 307-11 (1940) (invalidating state offense of "breach of the peace," not on its face, but only to the extent that it was construed and applied to prevent the peaceful distribution of religious literature on the streets"); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding Wisconsin's mandatory school attendance law unconstitutional, but only as applied to Amish children who have graduated from the eighth grade). "If the invalid reach of the law is cured, there is no longer reason for proscribing the statute's application to unprotected conduct." *New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982).[27]

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[27] It must be noted that all but one of the cases cited in this paragraph (*Tennessee v. Garner*) concerned free speech and/or free exercise rights which, unlike abortion, are specifically protected by the *express* language of the Constitution. Yet, even in this area of the law, the Court has been reluctant to invalidate a statute on its face because it is overbroad unless the overbreadth is "substantial . . . , judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Unlike the free speech cases where the Court has invalidated a statute because of its overbreadth, the circumstances under which the New Hampshire parental notice of abortion act would be unconstitutional, even on the lower court's reading, would be limited to medical emergency abortions which, as the preceding argument demonstrates, are virtually non-existent. The extreme rarity of medical emergency abortions performed on minors simply does not justify a sweeping, wholesale invalidation of a statute

In the case at bar, a declaration of partial invalidity, *i.e.*, that the Act is unconstitutional to the extent that it requires parental notification in medical emergencies (and a limited injunction to enforce that declaration),[28] would allow the Act to be applied in all other circumstances, which is to say virtually *all* applications of the statute. *See* Argument I, *supra*. As evidenced by the severability language in the statute itself, the New Hampshire Legislature would prefer to have the Act enforced in its constitutional applications to not having an Act at all. *See Brockett, supra*, 472 U.S. at 506-07 ("[i]t would be frivolous to suggest . . . that the Washington Legislature, if it could not proscribe materials that appealed to normal as well as abnormal sexual appetites, would have refrained from passing the moral nuisance statute").[29] Here, it would not only be frivolous to make such a suggestion, but directly contrary to the will of the New Hampshire legisla-

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almost all of whose applications would be constitutionally valid. *See Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge") (Op. of Stevens, J). *See also Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that capital punishment may not be imposed on mentally retarded criminal defendants, but not striking down the death penalty on its face).

[28] The injunction could be drafted to conform to the definition of medical emergency upheld in *Planned Parenthood v. Casey*, *see* p. 8, n. 3, *supra*.

[29] *See also New York Central & Hudson River R.R. Co. v. U.S.*, 212 U.S. 481, 496-97 (1909) (holding that Congress would have wanted the Elkins Act applied to corporate common carriers engaged in interstate commerce even if individual carriers constitutionally could not be covered by the same Act).

ture.[30] To paraphrase what the Court said in *Leavitt v. Jane L.*, *supra*, 518 U.S. at 143-44, the relevant question is *not* whether the legislature would prefer to have the parental notice statute given effect in *all* of its applications, as opposed to only *some* of them (obviously, it would), but whether the legislature would prefer to have the overwhelming majority of applications of the statute given effect, if it could not apply the statute to the miniscule (perhaps null) class of medical emergencies involving pregnant minor patients. There is no need to speculate on how the legislature would answer this question–it already has in enacting the severability provision.

---

[30] Nothing in *Stenberg v. Carhart*, *see* p. 21, n. 24, *supra*, precludes the limited relief *amicus* suggests would be appropriate here (assuming that the Court determines that respondents have standing to challenge the parental notice law and that the law must have a medical emergency exception that includes serious threats to the pregnant minor's physical health). In *Stenberg*, the Court declared the Nebraska partial-birth abortion statute unconstitutional on its face, in part because it lacked a physical health exception. *See Stenberg*, 530 U.S. at 930-38. The state Attorney General, however, did not ask the Court to restrict its relief to a declaration of invalidity (and an accompanying injunction against enforcement tailored to such a declaration) that would have addressed only the unconstitutional applications of the statute (physical health reasons where the intact D & E procedure would be relatively safer for the patient). Moreover, given the Court's alternative basis for invalidating the statute (that it imposed an undue burden on women seeking second-trimester abortions, *see id.*, at 938-45), such a limited declaration (and injunction) would not have been a viable option.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the Thomas More Society, respectfully requests this Honorable Court to reverse the judgment of the Court of Appeals. Alternatively, *amicus* requests the Court to modify the lower court's judgment by declaring the New Hampshire Parental Notice Prior to Abortion Act unconstitutional and enjoining its enforcement only to the extent that it does not allow medical emergency abortions to be performed on pregnant minors.

Respectfully submitted,

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(847) 291-3848

Thomas Brejcha
Thomas More Society
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Chicago, Illinois 60603
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APPENDIX A

IDAHO DEPARTMENT OF

HEALTH & WELFARE

DIRK KEMPTHORNE - Governor
KARL B. KURTZ - Director

Jane S. Smith - State Registrar and Chief
BUREAU OF HEALTH POLICY AND VITAL STATISTICS
450 West State Street, 1st Floor
P.O. Box 83720
Boise, ID 83720-0036
PHONE 208-334-5980
FAX 208-332-7260

AFFIDAVIT - CERTIFICATION OF PUBLIC RECORD

STATE OF IDAHO)
) ss.
County of Ada)

Jane S. Smith, being duly sworn on oath, deposes and states as follows:

1. That your Affiant is the custodian of records for the Idaho Department of Health and Welfare, having been delegated that task from the Director of the Department of Health and Welfare.

2. That your Affiant has reviewed the attached compilations of information submitted to the Department on induced abortion reporting forms.

3. That your Affiant declares as custodian of records that the annexed document(s) are true and correct copies of public records, maintained in the normal course of business in a timely manner and are authentic and genuine

4. That your affiant hereby certifies the annexed documents as correct, that said documents are authorized by Idaho Code § 39-261(b), and that said documents are maintained on file in the Idaho Department of Health and Welfare offices at 450 West State Street, Boise, Idaho.

5. Further, your Affiant sayeth naught.

DATED this 29th day of June, 2005.

/s/ Jane S. Smith
Jane S. Smith
Custodian of the Records
Idaho Department of Health and Welfare

SUBSCRIBED AND SWORN to before me this 29th day of June, 2005.

/s/ Davalee Leavitt
Notary Public for Idaho
Residing at : Boise ADA ID
Commission Expires: Jan 10, 2011

[NOTARY SEAL]

INDUCED ABORTIONS OCCURRING IN IDAHO
Age <18, Informed Consent or Medical Emergency
2000–2003 and 2004 Preliminary

INFORMED CONSENT	2000*	2001	2002	2003	2004 Preliminary
Total Induced Abortions Occurring In Idaho, Females Aged <18	60	58	69	50	69
Written Informed consent of:					
A Parent and minor	15	55	65	49	68
Emancipated minor	1	–	1	–	–
Pursuant to Court order granting minor right to self-consent	–	3	3	1	1
Pursuant to order stating abortion is best interests of minor, despite absence of parental consent	–	–	–	–	–
Unknown, not stated	–	–	–	–	–
Medical Emergency	–	–	–	–	–
Induced Abortions Occurring Prior to Informed Consent Legislation*	44	N/A	N/A	N/A	N/A

* Legislation requiring written parental consent for patients under 18 years of age was enacted in 2000. The first full month data were collected on parental consent and medical emergency was October 2000.

2004 data are preliminary and may differ slightly from final data.

Data are based on the most current information available and may not match data previously published, due to updates in the data base.

Source: Idaho Department of Health and Welfare, Bureau of Health Policy and Vital Statistics (June 2005).

NEBRASKA HEALTH AND HUMAN SERVICES SYSTEM

DEPARTMENT OF SERVICES
DEPARTMENT OF REGULATION AND LICENSURE
DEPARTMENT OF FINANCE AND SUPPORT

STATE OF NEBRASKA
DAVE HEINEMAN, GOVERNOR

July 26, 2005

Paul Linton, Esq.
921 Keystone Avenue
Northbrook, Illinois 60062-3614

Dear Mr. Linton:

Since 1991, when the parental notice law for minors was enacted, there have been only two "emergency situations" involving minors reported to the Nebraska Health & Human Services System (NHHSS) for which compliance with the informed consent law was waived. One of these instances was reported in 1997 and the other in 1998. There were no cases involving minors for which compliance was waived for the years 1991-1996, and 1999-2004.

This information is based on reports submitted to and data maintained by the NHHSS pursuant to state law. "Medical Emergency" abortions under the parental notice law are not reported separately from "Emergency Situation" abortions under the informed consent law.

Sincerely,

/s/ Mark Miller
Mark Miller
Health Data Coordinator
NHHSS, Regulation & Licensure
301 Centennial Mall South
PO Box 95007
Lincoln, NE 68509-5007

D H E C

PROMOTE PROTECT PROSPER
Promoting and protecting the health of the public and the environment

BOARD:
Elizabeth M. Hagood
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Edwin H. Cooper, III

Carl L. Brazell

Steven G. Kisner

Coleman F. Buckhouse, MD

June 23, 2005

Paul Linton
921 Keystone Avenue
Northbrook, IL 60062

Dear Mr. Linton:

As per our telephone conversations, enclosed is a table showing abortions occurring in South Carolina to girls under the age of 17 by the variable "medical emergency" for calendar years 1997-2003. You will note that no reported abortion occurred as a result of a medical emergency for that age group.

If you have any questions or need additional assistance, please let us know.

Sincerely,

/s/ Mary Hill Glover

Mary Hill Glover
Assistant Manager
Data Quality & Management Branch
Division of Biostatistics

Enclosure

ABORTIONS OCCURRING IN SOUTH CAROLINA TO GIRLS LESS THAN 17 YEARS OF AGE BY A SELECT PROCEDURE TYPE, 1997–2003

YEAR	MEDICAL EMERGENCY	TOTAL NUMBER
1997	–	463
1998	–	381
1999	–	352
2000	–	351
2001	–	281
2002	–	244
2003	–	282
TOTAL		2,354

Prepared by: Division of Biostatistics and Health GIS, Public Health Statistics & Information Services, South Carolina Department of Health and Environmental Control, Columbia, SC 29201

ATTEST: These data were tabulated form official Induced Termination of Pregnancy reports (abortions) filed with the South Carolina Department of Health and Environmental Control

DATE: June 23, 2005 /s/ Murray B. Hudson

Murray B. Hudson M.P.H.
Director of Public Health
Statistics and Information
Services

TEXAS DEPARTMENT OF STATE HEALTH SERVICES

EDUARDO J. SANCHEZ, M.D., M.P.H.
COMMISSIONER
1100 W. 49th Street • Austin, Texas 78756
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June 28, 2005

Joe Pojman, Ph.D.
Executive Director
Texas Alliance for Life
2026 Guadalupe Street
Austin, Texas 78705-5609

Via Facsimile 512/472/6246
& First Class Mail

Re: Open Records Request of June 2, 2005

Dear Dr. Pojman:

The Department of State Health Services ("Department") has received your recent open records request regarding the number of emergency induced abortion certification forms submitted to the department during the years 2000 through 2005. The total number of minors receiving abortions without parental notification due to emergency circumstances is defined under TEX. FAM. CODE ANN. §33.002(a)(4) for each reporting year. A thorough review of the department's records indicated that the agency received no Emergency Induced Abortion Certification forms from Texas physicians for reporting years 2000–2005 (to date).

The department having no records responsive to your request will close its file. Please contact our office should you have any questions.

Sincerely,

/s/ Marc Allen Connelly
Marc Allen Connelly
Assistant General Counsel

(10)

FILED
AUG 4 - 2005
OFFICE OF THE

No. 04-1144

IN THE SUPREME COURT OF THE UNITED STATES

KELLY A. AYOTTE, ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICI CURIAE* OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND ROMAN CATHOLIC BISHOP OF MANCHESTER IN SUPPORT OF PETITIONER

Mark E. Chopko*
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August 5, 2005

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Lambert v. Wicklund, 520 U.S. 292 (1997)	6, 8

Lambert v. Yellowley, 272 U.S. 581 (1926)	10
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Maher v. Roe, 432 U.S. 464 (1977)	5
Meyer v. Nebraska, 262 U.S. 390 (1923)	12
Missouri, K. & T.R. Co. v. May, 194 U.S. 267 (1904)	24
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	11
Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990)	6, 8, 13, 21
Parham v. J.R., 442 U.S. 584 (1979)	12
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	11
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Planned Parenthood v. Heed, 390 F.3d 53 (1st Cir. 2004)	9, 21

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Roper v. Simmons, 125 S.Ct. 1183 (2005) 15, 23

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Women's Medical Center v. Archer, 159 F.Supp.2d 414 (S.D. Tex. 1999), *aff'd in part, rev'd in part sub nom.*, 248 F.3d 411 (5th Cir. 2001) 14

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Reply Brief of Cross-Petitioners (State of Minnesota, *et al.*), 1989 WL 1127554, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Nos. 88-1125 and 88-1309) 7

Joel Brind, *et al.*, *Induced Abortion as an Independent Risk Factor for Breast Cancer: a Comprehensive Review and Meta-analysis*, 50 J. of Epidemiology and Community Health 481 (1996) 19

Matthew J. Bulfin, M.D., *A New Problem in Adolescent Gynecology*, 72 Southern Med. J. 967 (Aug. 1979) 16

Ronald T. Burkman, M.D., *Morbidity Risk Among Young Adolescents Undergoing Elective Abortion*, 30 Contraception 99 (Aug. 1984) 18

Willard Cates, Jr., M.D., *et al.*, *The Risks Associated with Teenage Abortion*, 309 New Eng. J. Med. 621 (Sept. 15, 1983) 17, 18

Center for Gender Equality, *Progress and Perils: How Gender Issues Unite and Divide Women, Part Two* (April 7, 2003) 22

Janet R. Daling, *et al.*, *Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion*, 86 J. of Nat'l Cancer Institute 1584 (Nov. 2, 1994) 19

John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*," 82 Yale L.J. 920 (1973) 23

Wanda Franz & David Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 Adolescence 161 (Spring 1992) 16

B. Garfinkel, *et al.*, STRESS, DEPRESSION AND SUICIDE: A STUDY OF ADOLESCENTS IN MINNESOTA (1986) 20

Mary Ann Glendon, ABORTION AND DIVORCE IN WESTERN LAW (1989) 23

The Harris Poll #18 (March 3, 2005) 22

Stanley K. Henshaw & Kathryn Kost, *Abortion Patients in 1994-1995: Characteristics and Contraceptive Use*, 28 Family Planning Perspectives, 140 (July/August 1996) 15

Warren M. Hern, ABORTION PRACTICE (1990) 13

James Kent, COMMENTARIES ON AMERICAN LAW (Da Capo ed. 1971) 11

Angela Lanfranchi, M.D., "The Abortion-Breast Cancer Link: The Studies and the Science," in THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION (2004) 18

Los Angeles Times Poll, Study #514 (Jan. 18, 2005) 22

David C. Reardon, *et al.*, *Deaths Associated with Abortion Compared to Childbirth – A Review of New and Old Data and the Medical and Legal Implications*, 20 J. of Contemp. Health L. & Policy 279 (Spring 2004) 19,20,21

Elizabeth Ring-Cassidy & Ian Gentles, WOMEN'S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE (2002) 17, 19

Royal College of Obstetricians and Gynecologists, THE CARE OF WOMEN REQUESTING INDUCED ABORTION: EVIDENCE-BASED CLINICAL GUIDELINE NO. 7 (Sept. 2004) 17, 19

Kenneth F. Schulz, *Measures to Prevent Cervical Injury During Suction Curettage Abortion*, The Lancet 1182 (May 28, 1983) 17

Elizabeth M. Shadigian, M.D., "Reviewing the Evidence, Breaking the Silence: Long-term Physical and Psychological Health Consequences of Induced Abortion," in THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION (2004) 17, 19

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John M. Thorp, Jr., M.D., *et al.*, *Long-term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 Obstetrical and Gynecological Survey 67 (2002) 17,18, 19, 20

Aida Torres & Jacqueline Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169 (July/Aug. 1988) 17

Laurence H. Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973) 23

Benjamin Wittes, *Letting Go of Roe*, Atlantic Monthly (Jan./Feb. 2005) 23

INTEREST OF *AMICI*[1]

The United States Conference of Catholic Bishops ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the Catholic bishops of the United States. The Conference is a vehicle through which the bishops can speak collegially on matters affecting the Catholic Church, its people, and society as a whole. The Conference advocates and promotes the Church's pastoral teaching in such areas as education, family life, health care, social welfare, immigrant aid, poverty assistance, and communications.

The Roman Catholic Bishop of Manchester ("Diocese"), a corporation sole, is coterminous with the State of New Hampshire, home to over 330,000 Catholics. The Diocese is led by Most Reverend John B. McCormack, Bishop of Manchester, a member of the Conference. On behalf of the Catholic faithful of New Hampshire, Bishop McCormack and the Diocese strongly supported enactment of New Hampshire's parental notification law and participated as an amicus in this case in the Court of Appeals.

This case presents an opportunity for this Court to fulfill the promise it made in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which restored to legislatures broader power to regulate abortion than some of this Court's previous cases had recognized. Applying *Casey* and other precedent, this Court should reject the attempt to portray parental notice laws as creating a conflict between the rights of parents and the interests

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[1]Pursuant to this Court's Rule 37.6, counsel for a party did not author this Brief in whole or in part. No person or entity, other than the United States Conference of Catholic Bishops, made a monetary contribution to the preparation or submission of this Brief. The parties have consented to the filing of this Brief. Letters of consent are filed herewith.

of their children. If a family is to retain its vitality and integrity when confronted with the reality of an unexpected pregnancy, parents must, at a minimum, be permitted to reflect upon and discuss with their pregnant adolescent daughter the decision whether to carry her child to term or to undergo an abortion. A State may ensure that the family will have an opportunity for this kind of consultation. To hold otherwise is to undermine familial relationships and the health and well-being of the family's adolescent members.

SUMMARY OF ARGUMENT

Parents are the undisputed guardians of their children's health. This is part of the constitutionally protected right and responsibility parents undertake in the care and upbringing of their own children. New Hampshire sought to advance those interests by passing a law ensuring a parent's involvement in a dependent teenage daughter's decision whether to carry a child to term or to have an abortion. The First Circuit read this Court's precedents to require that the New Hampshire law include a "health exception" which would give an abortion provider the discretion to dispense with the notification requirement anytime it deems an abortion necessary for the minor's health. This holding is contrary to this Court's precedent and common sense.

New Hampshire's law is constitutional. This Court has upheld against constitutional challenge a Minnesota parental notice law despite the absence of a "health" exception. *Hodgson v. Minnesota*, 497 U.S. 417 (1990). The Minnesota statute is materially indistinguishable from New Hampshire's. *Hodgson* therefore controls here. The First Circuit's opinion requires one to assume that this Court, in *Casey*, rewrote its parental notification precedent and overruled *Hodgson* without saying so. Given *Casey*'s lengthy discussion of the need to respect

precedent, its explicit overruling of two previous cases, its favorable citation to *Hodgson*, and its insistence that states should now be freer to regulate abortion, an "implicit" overruling of *Hodgson* seems far-fetched.

By contrast, *Stenberg v. Carhart*, 530 U.S. 914 (2000), upon which the First Circuit relied, is distinguishable. *Carhart*, which purports (530 U.S., at 921, 938) only to apply *Casey*, held that a ban of a particular method of abortion requires a health exception if a significant body of medical authority claims, with evidentiary support, that the procedure is medically necessary. The New Hampshire law is not a ban.

It would be a grave mistake to divest parents of meaningful input into the health care of their own dependent children. The First Circuit's decision falsely assumes a conflict between the right and responsibility of parents to care for their children, on the one hand, and the best interests of their children, on the other. In every other context, the law assumes that parents are the natural guardians of their children's health and best interests. It should be no different here. It is folly to believe that third parties are in a better position than parents to protect the interests of their children. Such a view is inconsistent with how the law generally treats parents and children. Indeed, recognizing the fundamental and constitutionally protected role of parents in caring for their children, this Court has upheld laws requiring parental *consent* to an abortion. The New Hampshire law requires only notification. Hence, this is an easier case.

Requiring a health exception in this case is unnecessary and would undermine the whole point of the notification requirement. First, health is rarely the reason for an abortion. Most abortions are elective. Second, when health is at issue, the need for parental notice for their teenage daughter's abortion is all the more compelling in light of the demonstrated physical and

mental health risks of abortion. Third, a health exception would be subject to abuse because it would make an abortion practitioner with a financial interest in performing an abortion (typically a doctor with no prior experience treating the patient and no knowledge of her medical history) the custodian, in place of the parents, of a pregnant teen's interests. This substitution of interests cannot be squared with the paramount place that American society and institutions, including this Court, have always reserved for parents in relation to their minor, dependent children. Fourth, in any case where the minor's and parents' interests are in actual conflict, the New Hampshire statute allows minors to bypass their parents through 24-hour access to the state courts. Though this Court has never held that such a bypass is constitutionally required for a one-parent notice statute, it is certainly sufficient to protect minors in case of any divergence between the interests of parents and their children.

At bottom, the decision below is a throwback to an earlier and now-discredited era in which this Court admits it went "too far" (*Casey*, 505 U.S., at 875) in striking down reasonable abortion legislation that in no sense deprived a woman of the ultimate decision whether to have an abortion. Concerns with upholding precedent and preserving this Court's institutional integrity, values that so motivated the *Casey* plurality, counsel adherence to this Court's earlier decision in *Hodgson*. In a broader sense, this case provides the entire Court with an opportunity to reassert, as seven Justices did in *Casey*, that some policy decisions on abortion, including those now before this Court, are simply beyond the judicial ken and appropriately left to legislatures.

ARGUMENT

I. New Hampshire's Parental Notice Statute is Consistent With This Court's Precedent

From the earliest stages of its abortion jurisprudence, this Court has insisted that abortion is not an absolute right. *Roe v. Wade*, 410 U.S. 113, 159 (1973) ("The pregnant woman cannot be isolated in her privacy"); *Maher v. Roe*, 432 U.S. 464, 473 (1977) ("*Roe* did not declare an unqualified 'constitutional right to an abortion'").

In the years immediately following *Roe*, this Court issued a number of decisions that, as the Court itself would later acknowledge, failed to give appropriate deference to the states' legitimate interests in regulating abortion. In 1992, this Court issued a landmark decision that cleared away some of the jurisprudential underbrush. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Seven justices in *Casey* concluded that this Court's earlier decisions had too severely and improperly restricted the states' power to regulate abortion. *Id.* at 871-78, 882 (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *id.* at 944 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part). The three-justice plurality, whose opinion on this issue, combined with the four justices who wanted to overrule *Roe* outright, is controlling, elaborated:

> [D]espite the protestations contained in the original *Roe* opinion to the effect that the Court was not recognizing an absolute right, 410 U.S., at 154-155, the Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision [whether to have an abortion]. *Those decisions went too*

> *far* because the right recognized by *Roe* is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. [438], at 453 [(1972)]. *Not all governmental intrusion is of necessity unwarranted*....

Casey, 505 U.S., at 875 (emphasis added). Explicitly overruled (*id.* at 882) were *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

Casey therefore restored to the states a power to regulate abortion that, by the plurality's own acknowledgment, had been eclipsed in decisions issued after *Roe*. It is this aspect of *Casey* that the present case implicates. The lower courts' analysis of Respondents' claims are a throwback to the sort of second-guessing of legislative decisions that seven justices in *Casey* explicitly rejected.

The same concerns about precedent and institutional integrity that animated *Casey* (505 U.S., at 845-46, 854-69) require that this Court follow *Hodgson v. Minnesota*, 497 U.S. 417 (1990), upholding a Minnesota parental notice statute. *Cf. Lambert v. Wicklund*, 520 U.S. 292, 297 (1997) (reversing and sharply criticizing the Ninth Circuit for failing to uphold a Montana parental notice statute that was "indistinguishable in any relevant way" from an Ohio statute upheld in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990)). The Minnesota statute, like New Hampshire's, included an exception to prevent the woman's death, but no general health or "medical emergency" exception. Writing for a plurality with respect to this part of the Court's judgment, Justice Kennedy concluded that the life-of-the-mother exception, along with a companion

exception for cases of parental abuse or neglect,[2] was sufficient to protect a pregnant teen's health. *Hodgson*, 497 U.S., at 492-93 (Kennedy, J., concurring in the judgment in part and dissenting in part).[3] The only material distinction between the Minnesota statute and New Hampshire's is that the former requires both parents to be notified, while the latter requires notification of only one parent. *Cf.* Minn. Rev. Stat. § 144.343, with N.H. Rev. Stat. § 132:24, VII. Hence, this is an easier case.

In the more than thirty years since *Roe*, this Court has never invalidated a parental notice statute based on the absence of a "medical emergency" exception, let alone a more general "health" exception. *Casey*, which cites *Hodgson* with approval (505 U.S., at 899-900), is not to the contrary. Eight justices in *Casey* voted to *uphold* a parental *consent* statute that had a medical emergency exception. 505 U.S., at 899-900 (opinion of O'Connor, Souter & Kennedy, JJ.); *id.* at 922 n.8 (Stevens, J.,

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[2]No contention is made in this case that the absence of a parental abuse and neglect exception renders the New Hampshire statute constitutionally suspect.

[3]Health was also considered by Justices who dissented from this portion of the Court's judgment in *Hodgson*. 497 U.S., at 465 (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("the prospect of having to notify a parent causes many young women to delay their abortions, thereby increasing the health risks of the procedure"). The parties in *Hodgson* had also raised the health issue. Brief of Cross-Respondents (Jane Hodgson, *et al.*), 1989 WL 1127353, at *15 n.29 (claiming that the statute's life-exception "does not help minors whose health problems warrant immediate abortions but whose lives cannot be certified to be so imminently endangered"); Reply Brief of Cross-Petitioners (State of Minnesota, *et al.*), 1989 WL 1127554, at *17-18 ("Plaintiffs assert ... that this exception is insufficient in that it fails to permit an immediate abortion necessitated by serious health problems which are not life threatening," and noting that the evidence was insufficient to support this assertion). The Minnesota statute has now been in effect for 15 years with no demonstrated harm to minors.

concurring in part and dissenting in part); *id.* at 970-71 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part). In *Casey*, this Court did not strike down, nor was it presented with, a parental consent statute that *lacked* a medical emergency exception. *Cf. Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (upholding a parental consent statute that lacked a health exception). Furthermore, a notice statute like New Hampshire's, by its very nature, does not interfere with the decision whether to have an abortion. Therefore, even if *Casey* could be construed as adverse precedent on this point, which it cannot, it would be distinguishable because at issue there was a *consent* statute, not a notice requirement. *Cf. H.L. v. Matheson*, 450 U.S. 398, 411 n.17 (1981) (this Court has "expressly declined to equate notice requirements with consent requirements"), citing *Bellotti v. Baird*, 443 U.S. 622, 640, 657 (1979) ("*Bellotti II*"); *Ohio v. Akron Center for Reproductive Health*, 497 U.S., at 511; *Hodgson*, 497 U.S., at 496 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Hodgson, cited favorably in both *Casey* (505 U.S., at 899-900) and *Lambert* (520 U.S., at 298 n.4), has never been overruled. Given the *Casey* plurality's extensive discussion of the need to respect precedent, its explicit overruling in part of *Thornburgh* and *Akron*, its favorable citation to *Hodgson*, and its insistence that states should now be freer to regulate abortion, an "implicit" overruling of *Hodgson* seems an unlikely reading of *Casey*.

Stenberg v. Carhart, 530 U.S. 914 (2000), does not dictate a different result. *Carhart* involved the outright ban of a particular method of abortion. This Court held that a general health exception was constitutionally required because a significant body of medical opinion had concluded that the procedure was medically necessary, a conclusion for which there was, in the

Court's view, a plausible explanation in the record. The New Hampshire statute, by contrast, does not ban a single abortion.

Carhart does not purport to rewrite previous case law, but only to apply *Casey*. *Carhart*, 530 U.S., at 921 ("we shall not revisit … [*Casey*'s] legal principles. Rather we apply them to the circumstances of this case"); *id.* at 938 (describing the holding in *Carhart* as a "straightforward application" of *Casey*). It would far exceed *Carhart*'s holding, and lead to absurd consequences besides, to require a "medical emergency" or "health" exception for all abortion regulation that does not ban abortion. What is distinctive about the "health" exception mandated in *Roe*, *Casey* and *Carhart* is that the mandated exception pertained in each instance either to a total ban of abortion (as in *Roe*, as reaffirmed by *Casey*) or a ban of a particular abortion procedure (as in *Carhart*).[4] As to abortion regulation that falls short of an outright ban, requiring a medical emergency or health exception would be incoherent because, among other things, those regulations are typically intended in

[4]Thus, the First Circuit got it wrong in this case when it read *Carhart* as creating a *per se* requirement that all abortion regulation include a health exception. *See Planned Parenthood v. Heed*, 390 F.3d 53, 58 (1st Cir. 2004) (stating that "an abortion regulation must contain an exception for the preservation of a pregnant woman's health"); *id.* at 59 & n.5 (rejecting amicus Bishop of Manchester's suggestion that health exceptions only apply to abortion bans, and concluding that "a statute regulating abortion must contain a health exception in order to survive constitutional challenge"). Other courts have likewise erred in this regard. *E.g.*, *Planned Parenthood v. Owens*, 287 F.3d 910, 918 (10th Cir. 2002). This Court could not have intended such a major change in the law without announcing it, for *Casey* merely reaffirmed what it characterized as *Roe*'s central holding, and *Carhart* in turn purports to be a "straightforward application" (530 U.S., at 938) of *Casey*. Accordingly, neither *Casey* nor *Carhart* can be read as embracing the sweeping substantive requirement that each and every abortion regulation a state promulgates be accompanied by a health exception.

the first instance to advance a woman's health. As a surgical procedure, abortion falls well within the ambit of New Hampshire's regulatory authority.[5] The Constitution does not require a "health" exception to a health regulation, whether it involves abortion or any other surgical procedure, because the regulation itself represents a legislature's judgment about what will best serve the health and well being of its citizens. An exemption in this instance would give an abortion practitioner with a financial interest in performing an abortion – typically a doctor with no previous experience treating the patient and no knowledge of her medical history – unfettered and unpoliced power to decide whether a parent should be notified. *See Carhart*, 530 U.S., at 1012 (Thomas, J., dissenting) (noting the problems inherent in a "health" exception); *id.* at 953 (Scalia, J., dissenting) (same); *id.* at 964-65 (Kennedy, J., dissenting) (same). The potential for abuse is heightened by the extraordinary breadth that this Court has occasionally given to such terms as "health" in the abortion context. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). In sum, a regulation that allowed doctors to exempt themselves from the regulation would be no regulation at all.

II. The New Hampshire Statute Preserves Family Integrity and Protects the Right of Parents to Care for Their Children

New Hampshire's parental notice law is built on the common sense premise that parents should know about and be involved in

[5] *Roe v. Wade*, 410 U.S., at 154 (the state has "important interests in safeguarding health" and "maintaining medical standards"); *Whalen v. Roe*, 429 U.S. 589, 604 (1977) (a physician has no right to practice medicine according to his own unfettered judgment); *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) (the authority to regulate the practice of medicine is a "vital part of a state's police power"); *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) ("there is no right to practice medicine which is not subordinate to the police power of the states").

life-affecting decisions by their own children. *Casey*, 505 U.S., at 895 (joint opinion of O'Connor, Kennedy & Souter, JJ.) (parental involvement laws "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart"). Opponents of parental notice suggest that these legislative efforts neither aid families nor promote the legitimate exercise of rights, but only allow parents to deny their adolescent daughters unfettered access to abortion. By framing the debate in this case as a conflict between parents' and children's rights, those opponents are missing the most important point. This Court has cautioned against "intrusion by a State into family decisions," *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972), delineating instead a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). As with other significant subjects that might come up from time to time within a family, a teen must be given the opportunity, in consultation with her parents, to face the important decision whether to have an abortion.

Protection for parental involvement in the care of one's children is deeply rooted in the Nation's history and traditions. *Bellotti II*, 443 U.S., at 638; *see also Moore v. City of East Cleveland*, 431 U.S. 494, 503 & n.12 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).[6] The right to raise and

[6] At common law in England and the United States, the duties of parents to maintain, support, and educate their children were well established. I William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 16, 434-40 (1765-69); II James Kent, COMMENTARIES ON AMERICAN LAW, 159-60, 164 (Da Capo ed. 1971). The duties of children relative to their parents were also well established. I Blackstone at 441-42; II Kent at 172-73. The common law family relationship may be described as mutual and reciprocal. I Blackstone at 434-42; II Kent at 159. Each member was bonded to the other in what one court called a "mutual interest" in interdependence. *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977).

care for one's child has been deemed "essential to the orderly pursuit of happiness" by a free people, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and a "basic civil right[] of man." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents...." *Prince*, 321 U.S., at 166. Indeed, the integrity of the family, which includes the right of parents to direct the care and nurture of their children, is so fundamental that it has been found to draw its protection from more than one constitutional guarantee. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), citing *Meyer*, 262 U.S., at 399 (Fourteenth Amendment Due Process Clause); *Skinner*, 316 U.S., at 541 (Fourteenth Amendment Equal Protection Clause); and *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (Ninth Amendment).

Our common law heritage (*see* note 6, *supra*) presumes that "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Because this Court has found that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning ... medical care or treatment" (*id.* at 603), it must not divest parents of meaningful input into their dependent child's abortion decision. Where evidence exists as to specific concerns, it does not serve the public interest for this Court, based on "expert" opinion in one trial court, to upset centuries of tradition.

Here, New Hampshire was on firm constitutional ground in striving to recognize and protect the right of parents to participate in health care decisions involving their own children. Even if one can posit situations in which the interests and rights of parent and child are so divergent as to render parental notice unwise, New Hampshire has created an accommodation in the form of a judicial bypass. The New Hampshire bypass, which gives minors access to the courts twenty-four hours a day, seven

days a week (*see* N.H. Rev. Stat. § 132:26), is entirely sufficient as an accommodation to minors.[7]

III. The New Hampshire Statute Advances the Health and Welfare of Pregnant Minors

Abortion is a surgical procedure which, its practitioners admit, poses a sufficient risk to maternal life and health to require a high level of skill and competence. Warren M. Hern, ABORTION PRACTICE 101 (1990). In this case, the health and welfare of pregnant minors is promoted, not undermined or compromised, by New Hampshire's parental notice statute. A parental involvement statute, among other things, provides "an opportunity for parents to supply essential medical and other information to a physician," *H.L.*, 450 U.S., at 411, including "information ... of which the minor may not be aware." *Hodgson*, 497 U.S., at 428 n.11 (citing lower court findings). "Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." *H.L.*, 450 U.S., at 411. Parents can provide the "mature advice and emotional support" a teenage girl needs in deciding whether to have an abortion at all, counsel and support that she is "unlikely" to get from the attending physician at an abortion clinic. *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring).[8] Parental involvement statutes are an

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[7]This Court has never decided, nor need it decide here, whether a judicial bypass is constitutionally required for a one-parent notice statute like New Hampshire's. *Ohio v. Akron Center for Reproductive Health*, 497 U.S., at 510 (leaving the question open).

[8]Justice Stewart's opinion includes an excerpt from the record in *Bellotti v. Baird*, 428 U.S. 132 (1976), showing the operation of one such clinic:

> The counseling ... occurs entirely on the day the abortion is to be performed.... It lasts for two hours and takes place in groups

appropriate vehicle for "giving the parents an opportunity to foster [the child's] welfare by helping [her] to make and to implement a correct decision." *Danforth*, 428 U.S., at 104 (Stevens, J., concurring in part, dissenting in part). Such statutes "maximiz[e] the probability that the decision [whether to have an abortion will] be made correctly and with full understanding of the consequences of either alternative." *Id.* at 103.

A parental notice requirement "permits the parent to … discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in evaluating the impact of the decision…." *Hodgson*, 497 U.S., at 448-49 (opinion of Stevens, J.). Informed consent requirements "have particular force with respect to minors" and "may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the

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> that include both minors and adults who are strangers to one another…. The physician takes no part in this counseling process…. Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques….
>
> The abortion itself takes five to seven minutes…. The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician … may be performing abortions on many other adults and minors…. On busy days patients are scheduled in separate groups, consisting usually of five patients…. After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room….

Danforth, 428 U.S., at 91 n.2 (Stewart, J., concurring). There is no indication this has changed. *E.g.*, *Women's Medical Center v. Archer*, 159 F.Supp.2d 414, 428 (S.D. Tex. 1999) (citing abortion practitioner's testimony concerning the "cattle herd mentality" common in abortion clinics), *aff'd in part, rev'd in part on other grounds sub nom.*, 248 F.3d 411 (5th Cir. 2001).

consequences of her decision in the context of the values and moral or religious principles of their family." *Casey*, 505 U.S., at 899-900 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

Parental involvement is critical to ensure not only that the adolescent's choice is informed, but that it is freely made and not the result of coercion or duress. High abortion rates are generally associated not with freedom, but with "lack of control over one's life" and "lack of financial and social resources."[9] A survey by a pro-choice post-abortion support group shows, for example, that many women feel pressured by the baby's father to have an abortion.[10] These concerns are heightened for adolescents who, as this Court has recently observed, are more susceptible than adults to "outside pressure" and other "negative influences," and more likely than adults to make decisions that are "impetuous and ill-considered." *Roper v. Simmons*, 125 S.Ct. 1183, 1195 (2005); *see also Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 311-12 (2000) (noting the susceptibility of adolescents to peer pressure and coercion). Among women who have negative psychological reactions to abortion after undergoing the procedure, minors are more likely than older patients to report being misinformed at the time of the

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[9]Stanley K. Henshaw & Kathryn Kost, *Abortion Patients in 1994-1995: Characteristics and Contraceptive Use*, 28 Family Planning Perspectives, 140, 147 (July/August 1996).

[10]Survey by host o[illegible]ww.afterabortion.com available at www.geocities.com/Athens/Parthenon/1362/surveyresults1.html (visited July 28, 2005). Eighty-five percent of the fathers of the unborn child offered no encouragement to continue the pregnancy. *Id.*, Question 6. When the woman said she wanted to continue the pregnancy, the dominant reaction of the unborn child's father was "slightly upset" (60%), angry (38%), and/or very angry (43%) compared to "happy" (.7%). *Id.*, Question 8. Seventy-three percent of the fathers suggested an abortion. *Id.*, Question 9.

abortion, to feeling forced or pressured into having the abortion, and being dissatisfied with the decision to undergo an abortion.[11]

A parent may also be helpful in choosing a qualified and competent medical provider. *Hodgson*, 497 U.S., at 448 (opinion of Stevens, J.) (a parental involvement statute "permits the parent to inquire into the competency of the doctor performing the abortion"); Testimony of Professor Teresa Stanton Collett before the New Hampshire Senate Judiciary Committee (May 16, 2003) at 4 (testifying that a well-informed parent is more likely to inquire into the qualifications of a physician than a teenager who is panicking over an unexpected pregnancy). Adolescents "are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals." *Bellotti II*, 443 U.S., at 641 n.21. Without parental input many minors "probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical." *Id.*

With respect to specific *medical* risks, even competent "doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweigh the disadvantages which a parent could evaluate in better perspective." *Danforth*, 428 U.S., at 104 (Stevens, J., concurring in part, dissenting in part). No woman, especially a minor, should be isolated in her privacy in weighing

[11]Wanda Franz & David Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 Adolescence 161 (Spring 1992). One physician reported that of the 54 teenage patients he had seen with "significant complications" after legal abortions, "one factor common to all of them stands out. None of them felt they had been afforded any meaningful information about the potential dangers of the abortion operation." Matthew J. Bulfin, M.D., *A New Problem in Adolescent Gynecology*, 72 Southern Med. J. 967, 968 (Aug. 1979).

these risks. *Roe*, 410 U.S., at 153-54.

Significantly, maternal health is rarely the reason for an abortion.[12] In those few cases where health is at issue, parental involvement is even more important, especially in light of the demonstrated physical and mental health risks associated with abortion generally,[13] risks often exacerbated in the adolescent population.[14] Parental notice is critical in assuring evaluation of

[12]Aida Torres & Jacqueline Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169, 170 (July/Aug. 1988) (reporting that mental or physical health is reported as a reason for abortion in only 3% of cases). *See Planned Parenthood v. Danforth*, 428 U.S., at 103 (Stevens, J., concurring in part, dissenting in part) ("the most significant consequences of the [abortion] decision are not medical in character").

[13]Immediate complications include hemorrhage, uterine perforation, cervical lacerations, and anesthetic complications. Elizabeth Ring-Cassidy & Ian Gentles, WOMEN'S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE 2 (2002); Royal College of Obstetricians and Gynecologists, THE CARE OF WOMEN REQUESTING INDUCED ABORTION: EVIDENCE-BASED CLINICAL GUIDELINE NO. 7, at 29 (Sept. 2004), available at http://www.rcog.org.uk/resources/Public/pdf/induced_abortionfull.pdf (visited July 28, 2005). Long-term complications include placenta previa and pre-term delivery in a subsequent pregnancy. John M. Thorp, Jr., M.D., *et al.*, *Long-term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 Obstetrical and Gynecological Survey 67, 70-72, 75 (2002); Elizabeth M. Shadigian, M.D., "Reviewing the Evidence, Breaking the Silence: Long-term Physical and Psychological Health Consequences of Induced Abortion," in THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION (2004), at 63, 67-68.

[14]It has long been reported, for example, that aborting teenagers are at an increased risk for cervical injury because "many women early in their teens have small, immature cervices, difficult to grasp with a tenaculum and to dilate." Kenneth F. Schulz, *Measures to Prevent Cervical Injury During Suction Curettage Abortion*, The Lancet 1182, 1184 (May 28, 1983); *see* Willard Cates, Jr., M.D., *et al.*, *The Risks Associated with Teenage Abortion*, 309 New Eng. J. Med. 621, 622, 624 (Sept. 15, 1983). Cervical injury is of special concern for adolescents because it may predispose them

these risks, and improves the post-operative medical care of dependent minors who decide to have an abortion by ensuring "that parents have adequate knowledge to recognize and respond to any post-abortion complication that may develop." Testimony of Professor Teresa Stanton Collett before the New Hampshire Senate Judiciary Committee (May 16, 2003) at 5.

Moreover, there are specific health issues where the patient is an adolescent. Setting aside the disputed question whether abortion is an independent risk factor for breast cancer,[15] it is widely accepted that by sacrificing the protective effect of a delivery, a woman who has an abortion increases her risk of breast cancer. The increased risk "is most pronounced in women under 20 years of age who elect to undergo abortion rather than continue their pregnancy."[16] An 18-year-old woman's decision to have an abortion nearly doubles her five-year and lifetime risk

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to adverse outcomes in future pregnancies. Cates at 624. Aborting adolescents are also reported to be at an increased risk of endometritis (inflammation of the uterine lining). Ronald T. Burkman, M.D., *Morbidity Risk Among Young Adolescents Undergoing Elective Abortion*, 30 Contraception 99, 101, 103-04 (Aug. 1984).

[15]If abortion is not an independent risk factor for breast cancer, then a woman's risk of contracting breast cancer as a result of abortion is no greater than if she had never become pregnant at all. Angela Lanfranchi, M.D., "The Abortion-Breast Cancer Link: The Studies and the Science," in THE COST OF CHOICE, *supra* note 13, at 72, 84. If, however, abortion is an independent risk factor for breast cancer, then a woman who aborts is at greater risk for breast cancer than the woman who did not become pregnant. *Id.* Of course, a pregnant teen is not faced with the choice of whether to get pregnant or not, but whether to have an abortion or carry the child to term. It is recognized within the medical community that *that* decision has implications for her risk of breast cancer whether or not abortion is an independent risk factor for breast cancer. *See* discussion *infra* at 18-19.

[16]Thorp, *supra* note 13, at 76.

of breast cancer at age 50.[17] One study of nearly 2,000 women found 12 who had a combined history of an abortion before age 18 and a positive family history of breast cancer, and *all* 12 women went on to develop breast cancer before the age of 45.[18]

The only published, quantitative meta-analysis to take up the question whether abortion is an independent factor for cancer (*see* note 15 *supra*) reports an odds ratio for breast cancer of 1.3 in women with previous induced abortion (*i.e.*, for every ten women who develop breast cancer and have not had an abortion, there are 13 who develop breast cancer and have had an abortion, representing a 30% increased risk), not an insubstantial risk for an adolescent considering an abortion.[19]

In addition, there is evidence of a link between abortion and suicidal ideation among women generally. Aborting women are 3.1 to 6.5 times more likely to commit suicide compared to delivering women.[20] Evidence of a correlation is even stronger

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[17]Shadigian, *supra* note 13, at 65; WOMEN'S HEALTH AFTER ABORTION, *supra* note 13, at 23. *See also* Janet R. Daling, *et al.*, *Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion*, 86 J. of Nat'l Cancer Institute 1584, 1585 (Nov. 2, 1994) (risk of breast cancer among women who underwent their first induced abortion before the age of 18 was 250% higher than among other women).

[18]Daling, *supra* note 17, at 1588; WOMEN'S HEALTH AFTER ABORTION, *supra* note 13, at 26 (discussing the Daling study).

[19]Joel Brind, *et al.*, *Induced Abortion as an Independent Risk Factor for Breast Cancer: a Comprehensive Review and Meta-analysis*, 50 J. of Epidemiology and Community Health 481 (1996), discussed in Shadigian, *supra* note 13, at 66, and Thorp, *supra* note 13, at 71-74. Great Britain's Royal College of Obstetricians and Gynecologists concluded that Brind's meta-analysis has "no major methodological shortcomings and could not be disregarded." THE CARE OF WOMEN REQUESTING INDUCED ABORTION, *supra* note 13, at 33.

[20]David C. Reardon, *et al.*, *Deaths Associated with Abortion Compared to*

for adolescents. One study shows, within a six-month period, a *ten-fold increase* in attempted suicides among teenage girls who had an abortion.[21] A comprehensive review of existing studies concluded that "[a]ny woman contemplating an induced abortion should be cautioned about the mental health correlates of an increased risk of suicide or self-harm attempts as well as depression and a possible increased risk of death from all causes."[22] Given the reported ten-fold increase in suicide attempts among adolescents who undergo an abortion, the need for parental involvement and follow up would appear to be even stronger.[23]

Consideration of the relevant risks is plainly essential for a woman's informed consent, whether a minor or not. There is even greater justification for regulation to ensure informed consent with respect to minors because they pose "unquestionably greater risks of inability to give an informed consent." *H.L.*, 450 U.S., at 411. With respect to minors, this Court has recognized that "[t]here is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion." *Id.* at

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Childbirth – A Review of New and Old Data and the Medical and Legal Implications, 20 J. of Contemp. Health L. & Policy 279, 298 (Spring 2004).

[21]B. Garfinkel, *et al.*, STRESS, DEPRESSION AND SUICIDE: A STUDY OF ADOLESCENTS IN MINNESOTA (1986), discussed in *Deaths Associated with Abortion Compared to Childbirth*, *supra* note 20, at 302.

[22]Thorp, *supra* note 13, at 76.

[23]This again underscores the need for parental involvement in supervising post-abortion care. *Hodgson*, 497 U.S., at 428 n.11. Parents can "support the minor's psychological well-being and thus mitigate adverse psychological sequelae that may attend the abortion procedure." *Id.* (quoting lower court findings).

408. Thus parental involvement is critical.[24]

IV. The Institutional Concerns at Issue in *Casey*, and a Proper Regard for the Respective Roles of this Court And Other Branches of Government, Support Reversal

Casey attempted to broker a kind of constitutional compromise. It did so by reaffirming *Roe*'s holding that the decision whether to have an abortion before viability resides with the woman, while requiring a more deferential standard of review than previously recognized (replacing strict scrutiny with the undue burden standard), thereby permitting broader regulation of abortion. *Casey* repeatedly underscores this point, emphasizing that what is protected under this Court's

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[24]It is all the more critical when an adolescent is faced with serious health issues. The First Circuit (390 F.3d at 63) relied heavily on the declaration of a single physician, a Dr. Wayne Goldner, concerning health risks that, in his opinion, necessitate an immediate "termination of pregnancy." Dr. Goldner does not claim that he has actually encountered, or intends to treat, any of the situations he describes, raising a question whether this case is justiciable at all. *Cf. Ohio v. Akron Center for Reproductive Health*, 497 U.S., at 514 (holding that the lower court should not have invalidated a parental notice statute "based upon a worst-case analysis that may never occur"). But more to our point, if there were a need for an immediate delivery, Dr. Goldner's declaration begs the question since the woman would still face the choice of whether to deliver the child or have an abortion, making parental involvement all the more critical. In other words, any danger posed by continuing the pregnancy would not require an abortion, but at most a choice between an abortion and a (potentially pre-term) delivery. In this regard, the oft-stated assumption that abortion is a "safer" choice than delivery, a claim that was critical in *Roe* (410 U.S., at 163), has come under recent challenge. *Deaths Associated with Abortion Compared to Childbirth*, *supra* note 20, at 281 (studies based on more reliable and objective data than earlier research show that pregnancy-associated deaths are "two to four times higher for aborting women compared to delivering women").

jurisprudence is a woman's *decision* whether to have an abortion, and that this Court's decisions after *Roe* had gone "too far" (505 U.S., at 875) in striking down regulations that did not unduly burden that decision.[25] As a result of *Casey*, states may not ban abortion, but they can substantively regulate it.

We disagree with the "balance" struck in *Casey*, believing, as do many others, that nothing in the Constitution forbids a legislature from prohibiting the intentional killing of any class of human beings. Indeed, it can be questioned whether failure to protect a segment of society with no political voice can be reconciled with values fundamental to the law, such as the protection of human life and the guarantee of equal justice for all, including people who are most vulnerable and socially marginalized. One earmark of *Roe*'s departure from long-standing public expectations about the role of law and government in protecting human life is that *Roe* has never enjoyed wide currency among the American public.[26] *Roe* has

[25]505 U.S., at 874 (the Constitution is implicated "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision"; what the Constitution forbids is undue interference with a woman's "freedom to decide whether to terminate her pregnancy"); *id.* at 877 ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.").

[26]A recent Harris poll reported that 72% and 86% of Americans believe abortion should be illegal in the second and third trimesters, respectively. The Harris Poll #18 (March 3, 2005). A Los Angeles Times poll in January 2005 found 53% saying abortion should be illegal in every case or with the rare exceptions of rape, incest, or to prevent the mother's death. Los Angeles Times Poll, Study #514 (Jan. 18, 2005), Question 65, available at http://www.latimesinteractive.com/pdfarchive/nationworld/la-011905poll1_pdf.pdf (visited July 28, 2005). Likewise, most women, polled separately, say abortion either should never be permitted or should be allowed only in cases of rape, incest, and to save the mother's life; only 30% of women think abortion should be "generally available." Center for Gender Equality, *Progress and Perils: How Gender Issues Unite and Divide Women, Part Two* (April 7, 2003) (conducted by Princeton Survey

even long been criticized by scholars and commentators who favor legalized abortion,[27] and is radically out of step with the laws of most other western nations. Mary Ann Glendon, ABORTION AND DIVORCE IN WESTERN LAW (1989); *cf. Roper v. Simmons*, 125 S.Ct., at 1198-1200 (considering the views of other nations in evaluating the constitutionality of executing adolescent offenders). Thus, unlike other landmark decisions of this Court,[28] *Roe* has never gained wide acceptance; indeed, opposition to the decision has only grown. *See* notes 26-27, *supra*.

For these and other reasons, on the question whether states may ban abortion, we believe *Casey* was wrongly decided. Yet, at the same time, *Casey* recognizes that policy decisions concerning abortion which do not unduly burden the ultimate decision whether to have an abortion are the proper domain of the legislative branches. For that reason, it would be radically inconsistent with *Casey* were this Court now to affirm that issues like parental involvement are left to it and lower courts rather

Research Associates).

[27]Among the extensive literature, *see, e.g.*, Laurence H. Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 7 (1973) ("One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found"); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*," 82 Yale L.J. 920, 947 (1973) ("*Roe* is a "very bad decision" because "it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be"); Benjamin Wittes, *Letting Go of Roe*, Atlantic Monthly (Jan./Feb. 2005) ("Since its inception *Roe* has had a deep legitimacy problem, stemming from its weakness as a legal opinion").

[28]*Cf., Brown v. Board of Education*, 349 U.S. 294 (1955), a decision based on constitutional amendments that were adopted to overcome the problem of socially-institutionalized racial inequality that *Brown* addressed.

than legislatures.[29] Such a result in the case at bar would not only repudiate the balance struck in *Casey*, but would undermine the values *Casey* sought to protect.

Casey disclaims any intent that this Court take upon its own shoulders the burden of deciding all important questions concerning abortion, leaving legislatures with power only to decide trivial issues. This Court is not, and surely does not wish to be, the Nation's medical board on abortion. Yet that is precisely what Respondents invite. Yielding to that temptation on the sensitive question of parental involvement in adolescent decisions whether to have an abortion, a question on which there are differing views and evolving evidence, would constitute a rejection of *Casey* and, just as seriously, inject this Court even deeper into issues that are properly decided by legislatures.

CONCLUSION

Respondents have failed to demonstrate, as they must to prevail, that there is a "clear incompatibility"[30] between the challenged New Hampshire statute and the Constitution. Indeed, the statute serves the legitimate interests of children, parents, and family integrity, interests deeply imbedded in our Nation's history and traditions. There is no constitutional basis for preventing New Hampshire's legislature from determining that children's health and welfare will be advanced in all cases by facilitating parental involvement in a minor's decision whether

[29] *See Akron v. Akron Center for Reproductive Health*, 462 U.S., at 465 (O'Connor, J., dissenting) (noting that legislatures are the appropriate forum for the resolution of sensitive issues and are "ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts"), quoting *Missouri, K. & T.R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.).

[30] *Legal Tender Cases*, 12 Wall. 457, 530-31 (1871); *Fletcher v. Peck*, 6 Cranch 87, 128 (1810) (Marshall, C.J.).

to have an abortion. Any exception beyond that already crafted by the New Hampshire legislature should be left to that body, which is in a superior position to evaluate competing claims and evolving evidence in protecting the health and welfare of its citizens.

The judgment of the Court of Appeals should be reversed.

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No. 04-1144

In the Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE, PETITIONER

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a plaintiff bringing a facial challenge to a statute regulating abortion must show that there is no set of circumstances under which the statute would be valid.

2. Whether respondents' facial challenge to the New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. §§ 132:24-132:28 (Supp. 2004), lacked merit because the statute was not required to contain an express health exception and contained a sufficient life exception.

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INTEREST OF THE UNITED STATES

This case concerns the constitutionality of New Hampshire's Parental Notification Prior to Abortion Act, which, with certain exceptions, prohibits a physician from performing an abortion on an unemancipated minor until 48 hours after written notice is delivered to a parent or guardian. Although that statute contains a judicial-bypass provision and an express exception for cases in which the abortion is necessary to preserve the life of the mother, it contains no express exception for the health of the mother.

In 2003, Congress enacted, and the President signed, the Partial-Birth Abortion Ban Act, Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531) (the Act). The Act prohibits a physician from knowingly performing a partial-birth abortion (as defined in the statute) in or affecting interstate commerce. § 3, 117 Stat. 1206-1207. Like the New

Hampshire statute at issue in this case, the Act contains an express exception for cases in which the abortion is necessary to preserve the life of the mother, but no express exception for the health of the mother. Congress, however, made extensive factual findings that a partial-birth abortion is never medically indicated to preserve a mother's health. § 2, 117 Stat. 1201-1206.

Facial challenges to the federal Act were filed within days of the President's signing the Act into law. Those challenges are currently pending in the lower courts, which are considering, *inter alia*, the question whether the Act is unconstitutional because it lacks an express health exception. See *Carhart* v. *Gonzales*, 413 F.3d 791 (8th Cir. 2005); *National Abortion Fed'n* v. *Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), appeal pending, No. 04-5201 (2d Cir. filed Sept. 29, 2004); *Planned Parenthood Found.* v. *Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), appeal pending, No. 04-16621 (9th Cir. filed Aug. 20, 2004). Because the Court's decision in this case on the standard for facial challenges to statutes regulating abortion, and on the ultimate validity of New Hampshire's parental-notification statute, may have direct relevance to the government's defense of an Act of Congress in ongoing litigation, the United States has a substantial interest in the outcome of this case.

STATEMENT

1. In 2003, the New Hampshire Legislature enacted the Parental Notification Prior to Abortion Act. N.H. Rev. Stat. Ann. §§ 132:24-132:28 (Supp. 2004). That statute prohibits a physician from performing an abortion on an unemancipated minor until 48 hours after written notice is delivered to a parent (or guardian). *Id.* § 132:25(I).[1] Notice may be provided in one of two ways: (1) by personal delivery to the parent by the physician or an agent, or (2) by certified mail addressed to the parent at the parent's residence, with restricted delivery and return receipt requested. *Id.* § 132:25(II) and (III). In the latter instance, delivery is deemed to have occurred at noon on the first day after mailing on which mail delivery takes place. *Id.* § 132:25(III). Notice is not required in two circumstances: (1) if the parent certifies in writing that he or she has in fact been notified, or (2) if the doctor "certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." *Id.* § 132:26(I).

The statute also contains a judicial-bypass provision. N.H. Rev. Stat. Ann. § 132:26(II) (Supp. 2004). If a minor "elects not to allow the notification of her parent," she may petition "any judge of a court of competent jurisdiction" to authorize her doctor to perform an abortion without notification. *Ibid.* The judge may authorize the abortion (1) if the judge determines that the minor is mature and capable of giving informed consent to the abortion, or (2) if the judge determines that performance of the abortion without notification would be in the minor's best interests. *Ibid.* The judicial-bypass provision specifies that the minor is entitled to court-appointed counsel, *id.* § 132:26(II)(a), and that proceedings shall be confidential, *id.* § 132:26(II)(b). It further specifies that proceedings "shall be given such precedence over other pending matters * * * that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor," and that the court must rule no later than "within 7 calendar days from the time the petition is filed." *Ibid.* The provision allows the minor to proceed with a similarly expedited appeal if the trial court denies the petition, *id.* § 132:26(II)(c), and states that access to the courts

[1] The statute imposes a similar requirement with regard to a woman for whom a guardian or conservator has been appointed because of a finding of incompetency. See N.H. Rev. Stat. Ann. § 132:25(I) (Supp. 2004).

for the purposes of such a petition "shall be afforded * * * 24 hours a day, 7 days a week," *ibid.*

The statute imposes civil and criminal penalties on a person who performs an abortion in violation of the statute, but creates a safe harbor if (1) the person establishes that he or she reasonably believed that representations of the minor regarding relevant information were bona fide and true or (2) the person attempted with reasonable diligence to deliver notice, but was unable to do so. N.H. Rev. Stat. Ann. § 132:27 (Supp. 2004). The statute also contains a broad severability provision. *Id.* § 132:28.

2. Before the statute took effect, respondents, three abortion-clinic operators and a doctor who performs abortions, filed suit in federal district court against the Attorney General of New Hampshire, seeking declaratory and injunctive relief.[2] Respondents brought a facial challenge to the statute, contending that the statute was unconstitutional in its entirety because (1) it lacked an express exception for cases in which an abortion was necessary to preserve the health of the mother and (2) it contained an insufficient exception for cases in which an abortion was necessary to preserve the life of the mother.[3] The district court held that the statute was unconstitutional on both grounds, and permanently enjoined its enforcement. Pet. App. 24-40. As a preliminary matter, the district court rejected the State's contention that the appropriate standard for a facial challenge to

[2] During the course of this litigation, petitioner Kelly A. Ayotte succeeded Peter Heed as the Attorney General of New Hampshire. For simplicity, we refer to the defendant in this litigation as "the State."

[3] Respondents also contended that the requirement that proceedings under the judicial-bypass provision be confidential was insufficient. The district court and the court of appeals both declined to address that contention after holding that the statute was unconstitutional on other grounds. See Pet. App. 21-22 (court of appeals); *id.* at 36-38 (district court).

a statute regulating abortion was whether there was "no set of circumstances" under which the statute would be valid. *Id.* at 28 (citing *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). Instead, the court reasoned that this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), and *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), "provide[d] the governing standard" for facial challenges in the abortion context. Pet. App. 29.

On the merits, the district court first held that the statute was invalid because it failed to "comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception." Pet. App. 33. The court rejected the State's contention that the judicial-bypass provision would sufficiently preserve the health of the mother, concluding that "the judicial bypass process necessarily delays an abortion in a health emergency." *Id.* at 34. The court cited the declaration of respondent Dr. Wayne Goldner, who stated that "certain medical conditions during pregnancy require immediate abortion to protect the health of the mother and that any delay would jeopardize her health." *Id.* at 35. The court then held that the statute insufficiently preserved the life of the mother because the statutory term "necessary" was unconstitutionally vague and because the statute could not be given a saving construction. *Id.* at 36.

3. The court of appeals affirmed. Pet. App. 1-23. On the question of the correct standard for facial challenges to abortion statutes, the court conceded that there was "tension" between the "no set of circumstances" standard from *Salerno* and the "undue burden" standard from *Casey* and *Stenberg*. *Id.* at 7. Ultimately, however, the court concluded that the "undue burden" standard "supersede[d] *Salerno* in the context of abortion regulation." *Id.* at 9.

As to respondents' claim that the statute was invalid because it lacked an express health exception, the court of ap-

peals reasoned that, in *Stenberg*, this Court "identified a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of a pregnant woman's health." Pet. App. 9. Thus, the court of appeals concluded, "a statute regulating abortion must contain a health exception in order to survive constitutional challenge." *Id.* at 10. The court reasoned that this requirement applied "regardless of the interests served by New Hampshire's parental notice statute," *id.* at 12, and notwithstanding this Court's earlier decision in *Hodgson* v. *Minnesota*, 497 U.S. 417 (1990), upholding a parental-notification statute that lacked a health exception, Pet. App. 12. Like the district court, the court of appeals rejected the State's contention that the judicial-bypass provision sufficed to preserve the health of the mother. *Id.* at 16-17. The court of appeals reasoned that "[d]elays of up to two weeks can * * * occur" under that provision, and added that, "[e]ven when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk." *Id.* at 17.

As to respondents' claim that the statute was invalid because it contained an insufficient life exception, the court of appeals reasoned that "the time component of the [statute's] death exception forces physicians either to gamble with their patient's lives in hopes of complying with the notice requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice." Pet. App. 18-19. In addition, the court noted, "a physician cannot know whether his or her determination that a minor's life is at risk will be judged according to a standard (e.g., knowingly) that respects [his or] her good-faith medical assessment, or by an objective standard (negligently) that would leave the physician's judgment open to *post hoc* second guessing." *Id.* at 20. The court concluded that "[t]he resulting uncertainty would * * * impermissibly

chill physicians' willingness and ability to provide lifesaving abortions." *Ibid.*

SUMMARY OF ARGUMENT

In facially invalidating the New Hampshire parental-notification statute, the court of appeals misapplied this Court's precedents both on facial challenges and on the substantive law concerning abortion. Under the standard articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), a plaintiff bringing a facial challenge to a statute (and thus seeking to render it void in all its applications) must demonstrate that the statute is in fact invalid in all its applications. That standard is both consistent with separation-of-powers principles and easy to administer. This Court's decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), did not purport to alter the standard for facial challenges in the abortion context generally. At most, it altered the standard for facial challenges in the narrow context of spousal-notification provisions. Because the Court did not purport to modify the facial-challenge standard more broadly, the default rule of *Salerno* controls here. There is no reason to abandon *Salerno* for facial challenges to statutes regulating abortion, or to import overbreadth principles that are tailored to the First Amendment free-speech context. To the extent that it is desirable to allow access to courts to challenge problematic *applications* of an abortion-related statute before plaintiffs suffer irreparable injury, such challenges can go forward on an as-applied basis, without the need facially to invalidate the entirety of the statute.

In any event, the dispute concerning whether to employ the "no set of circumstances" *Salerno* standard or the "large fraction" *Casey* standard is largely beside the point in this case. Because the vast majority of the applications of New Hampshire's parental-notification statute raise no constitu-

tional concern, the statute would survive facial attack under either standard. The court of appeals struck down the statute only by applying what amounts to an anti-*Salerno* standard, under which the possibility of a single unconstitutional application doomed the statute *in toto*. That was error.

The court of appeals likewise erred in extrapolating from this Court's decision in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), a bright-line requirement that any statute regulating abortion must contain an express health exception: that is, an exception for cases in which an abortion, or a particular type of abortion, is necessary to preserve the health of the mother. Such a reading of *Stenberg* would be inconsistent with numerous cases in which this Court has upheld parental-notification statutes without demanding that those statutes contain an express health exception. Instead, under *Stenberg*, an express health exception is necessary only in those contexts in which the absence of such an exception itself represents an undue burden. The absence of a health exception in some laws regulating abortion, such as a recordkeeping statute, would in no way impose an undue burden. Just as there is no need for a health exception to a recordkeeping statute, so too there is no need for a general health exception to a parental-notification statute. In cases involving non-emergency health issues, compliance with the statute's notification (or judicial-bypass) procedures can occur without imposing any undue burden.

To be sure, constitutional difficulties may arise to the extent the statute is applied in the specific context of emergency health risks, in which the emergency character of the situation would not allow time for the notification or judicial-bypass options to run their course. But it is the *emergency* context specifically, not the health context more generally, that creates potential difficulties. The courts below, however, appear to have faulted the statute for the absence of a more general health exception and did not require any specific showing as to the frequency with which health-related emergencies would arise. Respondents, for their part, presented no evidence to suggest that cases in which there will be emergencies that would preclude the ordinary operation of the statute constitute more than a small fraction of the statute's total applications, and thus provided no basis for striking down the statute in all its applications.

Finally, respondents failed to demonstrate any deficiency in the statute's life exception, which provides that a doctor may perform an immediate abortion upon concluding, in his or her subjective professional judgment, that an abortion is necessary to preserve the mother's life. The court of appeals' decision to invalidate the statute on that basis was thus also erroneous.

ARGUMENT

RESPONDENTS' FACIAL CHALLENGE TO NEW HAMPSHIRE'S PARENTAL-NOTIFICATION STATUTE LACKS MERIT

I. RESPONDENTS WERE REQUIRED TO SHOW THAT THERE IS NO SET OF CIRCUMSTANCES UNDER WHICH THE STATUTE WOULD BE VALID

The court of appeals first erred by rejecting the State's contention that, in order to mount a successful facial challenge, respondents had to demonstrate that there was "no set of circumstances" under which the New Hampshire parental-notification statute would be valid. That standard is generally applicable to facial challenges, and there is no justification for departing from that standard here.

A. The "No Set of Circumstances" Test Is The Correct Test For Facial Challenges

1. A facial challenge is "a claim that [a] law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*,

455 U.S. 489, 494 n.5 (1982) (quoting *Steffel* v. *Thompson*, 415 U.S. 452, 474 (1974)). Because the remedy being sought in a facial challenge is to invalidate the challenged statute in all its applications, it logically follows that a plaintiff bringing a facial challenge must show that the statute has no valid application. This Court most clearly articulated that principle in *United States* v. *Salerno*, 481 U.S. 739 (1987), in which the Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745.

In the years since *Salerno*, the Court has applied the "no set of circumstances" standard in a variety of contexts, including in facial challenges to statutes regulating abortion. See, *e.g.*, *Anderson* v. *Edwards*, 514 U.S. 143, 155 n.6 (1995) (state regulation concerning Aid to Families with Dependent Children program); *Reno* v. *Flores*, 507 U.S. 292, 301 (1993) (INS regulation governing release of detained alien juveniles); *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991) (HHS regulations prohibiting federally funded projects from engaging in abortion-related activities); *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (*Akron II*) (statute requiring parental notification); *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 523-524 (1989) (O'Connor, J., concurring in part and concurring in judgment) (statute prohibiting use of public facilities for performing abortions).

2. For two primary reasons, *Salerno*'s standard for facial challenges should apply here, and the New Hampshire statute should be invalidated in its entirety only if it is unconstitutional in all, rather than most or many, of its applications.

First, the *Salerno* standard is compelled by core limitations on the scope of the judicial power, as well as by broader separation-of-powers principles. Like other federal courts, this Court "has no jurisdiction to pronounce any statute

* * * void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool, N.Y. & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885). Because declaring a statute unconstitutional "is the gravest and most delicate duty that this Court is called on to perform," *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), the Court has noted that the power to do so "is not to be exercised with reference to hypothetical cases thus imagined," *United States* v. *Raines*, 362 U.S. 17, 22 (1960). The *Salerno* standard ensures that a court will not "frustrate the expressed will of Congress or that of the state legislatures" by enjoining the enforcement of a law even in situations in which such enforcement is, or would be, constitutional. *Barrows* v. *Jackson*, 346 U.S. 249, 256-257 (1953). And a proper respect for federalism complements the separation-of-powers interests underlying the *Salerno* rule to the extent that a plaintiff asks a federal court to invalidate a state statute in its entirety before "state courts [have] the opportunity to construe [the statute] to avoid constitutional infirmities." *New York* v. *Ferber*, 458 U.S. 747, 768 (1982); see *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973) (noting that the invalidation of a statute "prohibit[s] a State from enforcing the statute against conduct that is admittedly within its power to proscribe").

Second, *Salerno* provides a readily administrable standard by which a court can evaluate the validity of a challenged statute. If a court were required to determine whether a statute was invalid in most or many of its applications, it would have to "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," *Barrows*, 346 U.S. at 256, and make a quantitative judgment based on the actual or hypothetical application of the statute to parties not presently before it. See *Sabri* v. *United States*, 541 U.S. 600, 609 (2004) (noting

that facial challenges "invite judgments on fact-poor records"); cf. *Ferber*, 458 U.S. at 768 ("By focusing on the factual situation before us * * *, we face flesh-and-blood legal problems with data relevant and adequate to an informed judgment.") (internal quotation marks and footnotes omitted). Difficult questions about defining the number of unconstitutional applications in the "numerator" and the total relevant universe of applications in the "denominator" would abound. By requiring a court merely to determine whether the plaintiff can show that the statute lacks a single valid application, the *Salerno* standard obviates the need to count (and weigh) the number of valid and invalid applications.

B. The Doctrine Of Overbreadth Applies Only To Facial Challenges Under The First Amendment

1. The doctrine of overbreadth constitutes an exception to the rule that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others." *Broadrick*, 413 U.S. at 610. Under the overbreadth doctrine, a person whose conduct is not constitutionally protected may nevertheless challenge the constitutionality of a statute. *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). Such a plaintiff by definition cannot show that the statute is invalid in all of its applications (because the statute is not invalid as applied to the plaintiff). The plaintiff thus need only demonstrate that the statute's overbreadth is "substantial * * *, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. The Court has stressed, however, that "[a]pplication of the overbreadth doctrine * * * is, manifestly, strong medicine," and has employed that doctrine "sparingly and only as a last resort." *Id.* at 613.

2. This Court has expressly stated that the doctrine of overbreadth is applicable only in the "limited context" of

First Amendment speech claims. *Salerno*, 481 U.S. at 745; accord *Virginia* v. *Hicks*, 539 U.S. 113, 118 (2003); *Massachusetts* v. *Oakes*, 491 U.S. 576, 581 (1989); *Schall* v. *Martin*, 467 U.S. 253, 268 n.18 (1984).[4] Although the Court recently suggested that it has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term)" in other settings, *Sabri*, 541 U.S. at 609, the cases cited by the Court from other contexts did not involve "overbreadth" in the traditional sense, but instead involved statutes that were invalid in all of their applications under the relevant standards for evaluating the *merits* of the underlying constitutional claims. For example, in *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), the Court held that a statute that prohibited members of communist organizations from obtaining passports was not narrowly tailored and therefore infringed on the Fifth Amendment right to travel. *Id.* at 505-514. Similarly, in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Court held that a statute that "appear[ed] * * * to attempt a substantive change in constitutional protections" did not satisfy the congruence and proportionality test for enforcement legislation under Section 5 of the Fourteenth Amendment. *Id.* at 529-536. None of this Court's cases has actually applied the strong medicine of the overbreadth doctrine outside the First Amendment context.

3. There is no valid justification for extending the overbreadth doctrine to abortion cases—and thus to privilege access to an abortion over the panoply of constitutional rights to which the overbreadth doctrine does not apply. To be sure, the doctrine of overbreadth is justified by "the concern that the threat of enforcement of an overbroad law may deter or 'chill'" constitutionally protected conduct by other

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[4] The overbreadth doctrine does not apply even to all speech claims. See, *e.g.*, *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 380-381 (1977) (commercial speech).

regulated persons. *Hicks*, 539 U.S. at 119; accord *Oakes*, 491 U.S. at 581 (citing "the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions"). In noting that the overbreadth doctrine is limited to the First Amendment context, however, the Court has emphasized the fact that any "chilling" of the exercise of First Amendment rights would "harm[] not only [other regulated persons] but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 119. Even assuming that women who wished to obtain abortions would be unwilling to "undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation,"[5] the unavailability of the overbreadth doctrine in the abortion context does not have an impact on unregulated persons that is analogous to the harm to the marketplace of ideas in the First Amendment context. *Ibid.*

Moreover, in the abortion context, any potential chilling effect that flows from the need for access to courts before plaintiffs suffer irreparable injury can be addressed directly through other mechanisms that facilitate such access, and should not be addressed indirectly by altering the standard for facial challenges. As noted below, see pp. 25-28, *infra*, the potential for constitutional difficulties with the New Hampshire statute lies not in the absence of an express general health exception, but rather in the possible application

[5] Such an assumption would be somewhat in tension with the Court's repeated reliance on the existence of judicial-bypass provisions as a basis for sustaining abortion regulations. See, *e.g.*, *Akron II*, 497 U.S. at 510-517; *Hodgson* v. *Minnesota*, 497 U.S. 417, 461 (1990) (O'Connor, J., concurring in part and concurring in judgment in part); *id.* at 497-501 (Kennedy, J., concurring in judgment in part and dissenting in part); *Planned Parenthood Ass'n of Kansas City, Mo.* v. *Ashcroft*, 462 U.S. 476, 490-493 (1983).

of the statute in the exigent circumstances of a health-threatening emergency. Courts may be understandably reluctant to insist that a plaintiff suffer through an emergency before the plaintiff can challenge a statute. But courts need not change the rules for when a statute is invalid in its entirety to allow early access to the courts.

Specifically, a plaintiff may seek declaratory or injunctive pre-enforcement relief, in an individual or class action, on an as-applied basis before irreparable injury has actually been suffered—and obtain relief that reaches other, similarly situated individuals. See *Steffel*, 415 U.S. at 474 (observing, in upholding the availability of pre-enforcement declaratory relief in an as-applied challenge, that "[a] declaratory judgment of a lower federal court that a state statute is invalid *in toto*—and therefore incapable of any valid application * * * —will likely have a more significant potential for disruption of state enforcement policies than a declaration specifying a limited number of impermissible applications of the statute"); cf. *Bresgal* v. *Brock*, 843 F.2d 1163, 1170-1171 (9th Cir. 1987) (noting that "an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled").[6] In addition, as the court of appeals noted (Pet. App. 5 n.2), to the extent that a woman may be deterred from bringing such a suit,

[6] Of course, a question of ripeness may arise in such an as-applied action. Because respondents have brought only a facial challenge, however, this case does not provide a suitable vehicle to address such questions definitively. The salient point is that any concern about pre-enforcement access to court can be addressed *directly* through the ripeness doctrine. There is thus no need to address that concern indirectly by distorting the distinct doctrine of facial challenges and providing that a state statute can be struck down in its entirety based on the mere possibility of some unconstitutional applications.

abortion clinics and doctors who perform abortions "routinely have *jus tertii* standing" to assert the rights of women whose access to abortion is restricted. See, *e.g.*, *City of Akron* v. *Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 n.30 (1983) (*Akron I*); *Singleton* v. *Wulff*, 428 U.S. 106, 117 (1976) (plurality opinion); *Planned Parenthood of Cent. Mo.* v. *Danforth*, 428 U.S. 52, 62 (1976); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973). And a lawsuit raising an as-applied challenge could proceed even after the woman had an abortion, because challenges to statutes regulating abortion ordinarily qualify for the exception to general mootness principles for cases capable of repetition, yet evading review. *Roe* v. *Wade*, 410 U.S. 113, 124-125 (1973). When taken together, these doctrines directly address the problem of ensuring early access to court, and thereby alleviate the need to address the issue indirectly by distorting the facial-challenge standard and invalidating a statute even in constitutionally unproblematic contexts.

C. This Court's Decision In *Casey* Did Not Alter The Standard For Facial Challenges Outside The Context Of Spousal-Notification Provisions

1. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), the Court considered the constitutionality of various provisions of the Pennsylvania Abortion Control Act of 1982, including provisions that required a woman to give her informed consent before having an abortion; that required a minor to obtain the consent of one parent; and that, with certain exceptions, required a married woman to provide notice to her husband. The Court sustained the constitutionality of the entire statute, except for the spousal-notification provision. In Part IV of their joint opinion, Justices O'Connor, Kennedy, and Souter concluded that regulations that imposed an "undue burden" on a woman's right to an abortion were unconstitutional, and set

out the "undue burden" test. *Id.* at 878. Specifically, the joint opinion noted that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Ibid.* In Part V(C) of the joint opinion, Justices O'Connor, Kennedy, and Souter (joined in that subpart by Justices Blackmun and Stevens) applied the "undue burden" standard to invalidate the spousal-notification provision. *Id.* at 898. In the course of that discussion, the Court noted that, "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895. Elsewhere in that part of the joint opinion, the Court twice noted that the statute was likely to prevent a "significant number of women" from seeking abortions. *Id.* at 893, 894.

2. The joint opinion in *Casey* did not purport to alter the standard for facial challenges to all statutes regulating abortion. At most, the joint opinion applied a distinct standard for facial challenges to spousal-notification provisions. The joint opinion made no reference to a "large fraction" standard in upholding any of the other provisions that were under challenge, including the informed-consent and parental-consent provisions. See, *e.g.*, 505 U.S. at 881-887, 899-900. Moreover, the joint opinion expressly noted, immediately after its single reference to a "large fraction" of cases in its analysis of the spousal-notification provision, that the same method of analysis would not apply to parental-notification and parental-consent provisions. See *id.* at 895. Accordingly, outside the context of spousal-notification provisions, *Casey* left the law of facial challenges unaffected, and thus the default standard of *Salerno* applies. Indeed, even in the portion of the opinion discussing the spousal-notification provision, the joint opinion did not so much as cite *Salerno*, despite the fact that the Court had routinely applied the

Salerno standard in other, then-recent cases involving facial challenges to statutes regulating abortion. See *Rust*, 500 U.S. at 183; *Akron II*, 497 U.S. at 514; *Webster*, 492 U.S. at 523-524 (O'Connor, J., concurring in part and concurring in judgment). The joint opinion in *Casey* should thus not be read to have overruled *Salerno* more broadly, and to have altered the standard for facial challenges to abortion regulations more generally. See, *e.g.*, *Hohn* v. *United States*, 524 U.S. 236, 252-253 (1998) (noting that "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality").

II. RESPONDENTS' FACIAL CHALLENGE LACKS MERIT BECAUSE THE STATUTE WAS NOT REQUIRED TO CONTAIN AN EXPRESS HEALTH EXCEPTION AND CONTAINED A SUFFICIENT LIFE EXCEPTION

Regardless whether respondents were required to show that the New Hampshire parental-notification statute was invalid in all of its applications or merely a "large fraction" of them, the court of appeals erred by sustaining respondents' facial challenge and invalidating the entirety of the statute. Respondents failed to demonstrate that the statute was deficient either because it lacked an express health exception or because it contained an excessively narrow life exception.

A. The Court Of Appeals Applied An Improper Standard For Facial Challenges To Statutes Regulating Abortion

1. As a preliminary matter, in sustaining respondents' facial challenge on the ground that the New Hampshire parental-notification statute lacked an express health exception, the court of appeals suggested that the mere *possibility* that the statute could be applied unconstitutionally was a

sufficient basis on which to invalidate the statute on its face. Specifically, the court of appeals rejected the State's contention that the statute's judicial-bypass provision would sufficiently protect a mother's health, on the ground that "delays of up to two weeks *can* * * * occur" if a minor invokes the judicial-bypass provision. Pet. App. 17 (emphasis added). The court of appeals' reasoning, however, would seemingly turn the *Salerno* standard entirely on its head, by allowing a plaintiff to obtain facial invalidation of a statute by showing the mere possibility of an unconstitutional application, rather than demonstrating that the statute is unconstitutional in all its applications—a virtual presumption of facial invalidity that this Court has roundly rejected even in the unique context of the First Amendment. See *Ferber*, 458 U.S. at 772 ("We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application.") (quoting *Broadrick*, 413 U.S. at 630 (Brennan, J., dissenting)); see generally *Salerno*, 481 U.S. at 745 (noting that "[t]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid").

2. This Court has rejected similar reasoning in the specific context of parental-notification statutes. In *Akron II*, this Court upheld a parental-notification statute despite a claim that the statute's judicial-bypass procedure "could take up to 22 calendar days" and thus "increase by a substantial measure * * * the medical risks of an abortion." 497 U.S. at 513. The Court reasoned that the lower court "should not have invalidated the * * * statute on a facial challenge based upon a worst-case analysis that may never occur," and added that "the mere possibility that the procedure may require up to 22 days in a rare case is plainly insufficient to invalidate the statute on its face." *Id.* at 514. The court of appeals likewise erred to the extent that it relied on a "worst-

case analysis" in facially invalidating the New Hampshire statute.

B. This Court's Decision In *Stenberg* Did Not Require Every Statute Regulating Abortion To Contain An Express Health Exception

The court of appeals also erred by reading this Court's decision in *Stenberg* v. *Carhart*, *supra*, to impose a *per se* requirement that a statute regulating abortion must contain an express "health" exception: that is, an exception for cases in which an abortion, or a particular type of abortion, is necessary to preserve the health of the mother. See, *e.g.*, Pet. App. 9, 10. Indeed, to the extent that the court of appeals concluded that the statute was facially invalid because it lacked a provision to account for the statute's potential application to situations implicating the health of the mother, that also amounted to the adoption of an anti-*Salerno* standard, insofar as the court condemned the statute in its entirety based on the mere *possibility* of some unconstitutional applications.

1. In *Stenberg*, the Court considered a facial challenge to a Nebraska statute that banned "partial birth abortion" (as defined in the statute) unless the procedure was necessary to save the life of the mother. The Court held that the statute was invalid "for at least two independent reasons." 530 U.S. at 930. First, and more relevant here, the Court reasoned that the statute was unconstitutional because it lacked an express exception for the preservation of the health of the mother. *Id.* at 930-938. Second, the Court reasoned that the statute was unconstitutional because it could be read to cover not just the "dilation and extraction" abortion procedure commonly known as partial-birth abortion, but also the more frequently used "dilation and evacuation" procedure, and therefore posed an undue burden on a woman's access to an abortion. *Id.* at 938-946.

2. The Court did hold in *Stenberg* that the Nebraska statute was invalid because it "lack[ed] any exception" for cases in which the regulated procedure was necessary to preserve the health of the mother. 530 U.S. at 930. The Court, however, did not impose a bright-line requirement that *every* statute regulating *any* aspect of abortion must contain an express health exception, but instead required the statute at issue to contain a health exception only after determining, consistent with the "undue burden" test from the joint opinion in *Casey*, that "substantial medical authority support[ed] the proposition" that "[the] statute * * * create[d] a significant health risk." *Id.* at 938. The Court seemingly agreed with Nebraska that its statute "[did] not require a health exception unless there [was] a need for such an exception," *id.* at 931, but disagreed with Nebraska's premise that there was no need for such an exception. See *id.* at 932 (concluding, after reviewing the district court's "relevant findings and evidence," that "the findings and evidence support[ed]" the plaintiff). If the Court had imposed a *per se* requirement that statutes regulating abortion contain an express health exception, the Court's analysis of the "findings and evidence" would have been entirely unnecessary. Instead, the Court held that a health exception is necessary when the absence of such an exception represents an undue burden—and concluded, after reviewing the findings and evidence in the record in that case, that the Nebraska statute imposed such a burden.[7]

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[7] *Stenberg* similarly did not adopt a rule that a plaintiff can successfully bring a facial challenge to an abortion statute that does not contain an express health exception if the plaintiff demonstrates that the statute would impose a health risk on even a single woman. To the contrary, the Court repeatedly noted that the critical question was whether the statute would pose "*significant* health risks for women"—a formulation that is better read (consistent with *Casey*, see 505 U.S. at 893, 894) to suggest that the plaintiff must demonstrate that the statute would pose a substantial health risk to at least a "significant" number of women. *Stenberg*, 530

3. The logical consequence of the court of appeals' reading of *Stenberg* would be that *any* statute touching on abortion—even, for example, statutes imposing recordkeeping or reporting requirements—would be required to contain an express health exception. At a minimum, such a broad reading would be irreconcilable with the many cases in which this Court has upheld parental-notification (and parental-consent) statutes without imposing such a requirement. See, *e.g.*, *Lambert* v. *Wicklund*, 520 U.S. 292, 293 & n.1, 299 (1997) (per curiam); *Akron II*, 497 U.S. at 507, 510; *Hodgson* v. *Minnesota*, 497 U.S. 417, 422, 423 (1990); *Planned Parenthood Ass'n of Kansas City, Mo.* v. *Ashcroft*, 462 U.S. 476, 479 n.4, 493 (1983) (opinion of Powell, J.).

Most notably, in *Hodgson*, the Court upheld a parental-notification statute that lacked an express health exception and was also similar in other respects to the statute at issue here. Compare 497 U.S. at 423 n.1, 424 n.4, 426 nn.6-8, 427 n.9, with Pet. App. 2-6. Although the plaintiffs in *Hodgson* did not contend that the statute was unconstitutional specifically because it lacked an express health exception, they did contend that the judicial-bypass provision was necessary in order to prevent minors whose health was at risk from delaying or forgoing abortions, see Cross-Resp. Br. at 15 & n.29, *Hodgson*, *supra* (No. 88-1309), and the defendants countered that there was no evidence that a delay of 48 or even 72 hours was "medically significant," see Cross-Pet. Br. at 17-18, *Hodgson*, *supra* (No. 88-1309). In upholding the

U.S. at 932; see also *id.* at 931 (noting that "a State cannot subject *women's* health to *significant* risks" and adding that "[o]ur cases have repeatedly invalidated statutes that * * * imposed *significant* health risks"); *id.* at 938 (concluding that the statute at issue "creates a *significant* health risk"); *ibid.* (suggesting that an express health exception is required "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger *women's* health") (all emphases added).

parental-consent provision at issue in *Casey*, the joint opinion cited *Hodgson* with approval. See 505 U.S. at 899. And in *Lambert*, which postdated *Casey*, the Court again upheld a parental-notification statute without suggesting that a health exception was constitutionally required. See 520 U.S. at 299.[8] In *Stenberg*, the Court certainly provided no indication that it believed that the parental-notification statutes at issue in those earlier cases were in fact unconstitutional to the extent that they lacked express health exceptions—as the Court presumably would have done if it had imposed a blanket requirement that all statutes regulating abortion contain such exceptions.

4. Although the courts below seemed to embrace the view that all abortion statutes must contain a general health exception, there is no justification for requiring such an exception, as opposed to a narrower exception for medical emergencies, in the context of statutes (such as parental-notification or informed-consent statutes) that impose procedural requirements with attendant waiting periods. In the specific context of parental-notification statutes, there is no inherent tension between the government's underlying interests—ensuring informed choice and parental involvement when appropriate—and the mother's undoubted interest in preserving her health. In cases involving non-emergency health issues, all of those interests can be vindicated without difficulty. Potential tension arises only in cases implicating health-related *emergencies*—and even then, the source of the tension is not the notification requirement itself, but rather the associated waiting period.

[8] The statute at issue in *Lambert* did contain a limited exception (not otherwise discussed in the Court's opinion) for cases in which "a medical emergency exists and there is insufficient time to provide notice." See 520 U.S. at 293 n.1 (quoting statute).

Thus, the absence of a general health exception in New Hampshire's statute does not pose an undue burden on a minor's access to an abortion. In the numerous applications of the statute in which no health issues arise, the statute's notification, judicial-bypass, and waiting-period provisions operate without any constitutional concern. Likewise, when an abortion is necessary to preserve the minor's health, but no emergency or exigent circumstances exist, the statute raises no difficulties. The New Hampshire statute ordinarily requires a minor seeking an abortion to wait until 48 hours after notice is delivered, but allows notice (and the subsequent waiting period) to be waived if the parent certifies in writing that he or she has in fact been notified (as will presumably be the case when the parent accompanies the minor). N.H. Rev. Stat. Ann. § 132:26(I) (Supp. 2004). Moreover, under the statute's judicial-bypass provision, a minor can obtain a waiver of the notice (and waiting-period) requirement (1) if the minor is mature and capable of giving informed consent, or (2) if performance of the abortion without notification is in the minor's best interests. *Id.* § 132:26(II). When an abortion is necessary to preserve the minor's health on a non-emergency basis, the abortion in many cases will be able to be performed immediately (because the parent signs a certification), and in all other cases will be able to be performed a short time later. Even in emergency situations, the statute does not raise difficulties if the parent signs a certification, and the statute expressly accounts for life-threatening situations. Especially in light of the State's particular interest in ensuring that a minor's decision to have an abortion is "knowing and intelligent," *Hodgson*, 497 U.S. at 448 (opinion of Stevens, J.), any burden imposed by the statute's possible application to a subset of emergencies—which potentially could be addressed in a pre-enforcement as-applied challenge, see pp. 13-16, *supra*—is certainly not "undue."

C. Respondents Failed To Demonstrate That Health Emergencies Would Preclude The Ordinary Operation Of The Statute In More Than A Small Fraction Of The Cases To Which The Statute Applies

The New Hampshire parental-notification statute has the potential to pose an undue burden within the meaning of this Court's cases only if it is applied in cases in which an abortion is necessary to preserve the mother's health on an emergency basis. Cf. *Casey*, 505 U.S. at 879-880 (upholding generally applicable "medical emergency" exception to Pennsylvania abortion statute). Because respondents failed to demonstrate, however, that medical emergencies would arise in a significant fraction of the statute's overall applications, much less that the ordinary operation of the New Hampshire parental-notification statute would not accommodate emergency health risks in a significant fraction of applications, the statute should be sustained against respondents' facial challenge.[9]

1. It is beyond dispute that, whatever the appropriate standard for facial challenges, it is the plaintiff, and not the defendant, who bears the burden of proof. See, *e.g.*, *Salerno*, 481 U.S. at 745 (noting that "*the challenger* must establish that no set of circumstances exists under which the Act would be valid" (emphasis added)). Placing the burden of proof on the plaintiff is consistent with the venerable presumption of constitutionality that attends state statutes.

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[9] Before the court of appeals, the State contended that "other New Hampshire statutes allow medical providers to provide medical treatment to minors in the case of an emergency." Pet. C.A. Br. 14. The court of appeals rejected that contention. Pet. App. 14-16. The following discussion assumes *arguendo* that other New Hampshire statutes do not provide a "medical emergency" exception.

See, *e.g.*, *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 257-258 (1931).[10]

2. Respondents failed to demonstrate that emergency health risks would preclude the ordinary operation of the New Hampshire parental-notification statute in more than a small fraction of its applications. Since the court of appeals held that the statute was *per se* invalid because it lacked an express health exception, it did not discuss the factual record at all. For its part, the district court made only one relevant factual finding, determining that minors subject to the statute "could experience complications in their pregnancies that would endanger their health." Pet. App. 33 n.4. That observation, however, does little more than acknowledge the possibility of cases in which an immediate abortion may be necessary to preserve the mother's health. The district court did not even attempt to quantify the number of such health emergencies and compare them to the number of constitutionally valid applications of the statute. Nor did the district court consider how many such health emergencies would arise in situations in which the parent could provide an immediate certification or the minor could obtain a timely judicial bypass, or how many such health emergencies could also implicate the mother's life (and thus trigger the statutory life exception).

The only relevant evidence presented by respondents before the district court was the declaration of respondent Dr. Wayne Goldner, who "describe[d] medical complications which may occur during pregnancy putting pregnant minors at risk and requiring prompt or immediate termination of the

[10] This Court's decision in *Stenberg* is not to the contrary. *Stenberg* did not purport to place the burden of proof on the defendant, but instead noted only that, after the plaintiff had presented "substantial medical authority" demonstrating the need for an express health exception, the defendant had failed to present any evidence in rebuttal. See, *e.g.*, 530 U.S. at 932, 937-938.

pregnancy." Pet. App. 33 n.4. Dr. Goldner, however, merely identified various health complications that could result if a minor could not have an "immediate" abortion, see J.A. 23-26, and made no effort to quantify the cases in which such complications would occur—and indeed did not identify a single case, from his two decades of experience, in which such complications did in fact occur. In addition, Dr. Goldner conceded that "[t]he majority of [his] teenage patients who seek abortions (approximately 60 to 70 percent) bring a parent with them to the appointment." J.A. 22. In those cases (and, presumably, in others), the minor would be able to have an abortion without waiting for the statutory 48-hour notice period to run because the parent could certify that he or she had been notified. That concession alone suffices to demonstrate that, even in the universe of cases involving medical emergencies, the statute could operate without imposing an undue burden in the majority of its applications.

Moreover, Dr. Goldner, like the court of appeals, noted the hypothetical possibility that, if a minor sought to take advantage of the judicial-bypass provision, "the abortion *may* be delayed for a week, two weeks, and possibly longer." J.A. 23 (emphasis added). Dr. Goldner did not affirmatively claim, however, that the judicial-bypass provision—which by its terms provides that access to the courts "shall be afforded * * * 24 hours a day, 7 days a week," N.H. Rev. Stat. Ann. § 132:26(II)(c) (Supp. 2004)—*would* be insufficient, in any significant number of relevant cases, to preserve the health of minors with emergency health complications that required an abortion before the waiting period expired. Even if Dr. Goldner had demonstrated that emergency health risks would arise in more than a small fraction of cases, therefore, he did not additionally demonstrate that those risks could not be accommodated in some or all of those cases through the ordinary operation of the statute (*i.e.*, through prompt parental certification or judicial bypass).

In sum, because respondents failed to show that emergency health risks would preclude the ordinary operation of the statute in more than a small fraction of the cases to which the statute applies, respondents' claim that the statute was facially invalid should have been rejected under any standard. At most, the case should be remanded to allow respondents to make the requisite factual showing.

D. Respondents Failed To Demonstrate That The Statute's Life Exception Was Insufficient

Finally, the court of appeals erred by sustaining respondents' facial challenge on the alternative ground that the life exception in the New Hampshire statute was insufficient.

1. The statute's life exception provides that notice is not required if the doctor "certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." N.H. Rev. Stat. Ann. § 132:26(I) (Supp. 2004). The primary basis on which the court of appeals found the life exception to be insufficient was that it "fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk against criminal and civil liability." Pet. App. 21.

That conclusion was mistaken. The court of appeals correctly noted (Pet. App. 20) that the provision of the statute imposing criminal and civil liability for violations lacks any scienter requirement. See N.H. Rev. Stat. Ann. § 132:27 (Supp. 2004). Such a requirement, however, is unnecessary here to protect good-faith judgments or to ensure that a doctor has "broad discretion" to determine whether an abortion is necessary to preserve the life of the mother. *Colautti* v. *Franklin*, 439 U.S. 379, 394 (1979); accord *United States* v. *Vuitch*, 402 U.S. 62, 69-72 (1971). Although the statute does not contain an express scienter requirement, it does allow a doctor to perform an abortion without notice if the doctor

certifies, in writing, that the abortion is necessary to preserve the mother's life. N.H. Rev. Stat. Ann. § 132:26(I)(a) (Supp. 2004). By the plain terms of the statute, therefore, when a doctor makes such a certification, the doctor is insulated from liability. The statute at issue here is thus readily distinguishable from the statute invalidated in the case on which the court of appeals principally relied, *Women's Medical Professional Corp.* v. *Voinovich*, 130 F.3d 187 (6th Cir. 1997), cert. denied, 523 U.S. 1036 (1998). In that case, the relevant statutory provisions "contain[ed] both subjective and objective elements[,] in that a physician must believe that the abortion is necessary *and* his belief must be objectively reasonable to other physicians." *Id.* at 204. The court reasoned that the use of an *objective* standard, together with the absence of a scienter requirement, was "especially troublesome" for constitutional purposes. *Id.* at 205. In this case, by contrast, because a doctor is immune from liability upon concluding that, in his or her *subjective* professional judgment, an abortion is necessary to preserve the mother's life, the statute's life exception is constitutionally sufficient.

2. The other basis on which the court of appeals found the life exception to be insufficient was that "its time requirement is drawn too narrowly." Pet. App. 21. Specifically, the court of appeals reasoned that, because a doctor is required to certify not only that the abortion is necessary to preserve the life of the mother but also that there is insufficient time to provide the required notice, a doctor is effectively forced "either to gamble with [his or her] patients' lives in hopes of complying with the notice requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice." *Id.* at 18-19.

The statute, however, does not force a doctor to make such a choice. If a doctor believes at the outset that a minor has a medical condition that is presently life-threatening, the

doctor can certify that an abortion is necessary without notice, and proceed to perform the abortion. If, on the other hand, the doctor believes that a minor has a non-emergency medical condition that may later become life-threatening, either the doctor can comply with the notice requirement or the minor can take advantage of the statute's judicial-bypass provision. And if the doctor, after initially complying with the statute's notice requirement, subsequently determines (before the waiting period has elapsed) that there is an imminent threat to the minor's life, the doctor can then certify that an abortion is necessary without notice, and proceed to perform the abortion. Respondents thus have not demonstrated that the life exception contains any ambiguity or deficiency, let alone one that would justify the facial invalidation of the entirety of New Hampshire's parental-notification statute.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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In The
Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL
OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW
ENGLAND, CONCORD FEMINIST HEALTH CENTER,
FEMINIST HEALTH CENTER OF PORTSMOUTH,
AND WAYNE GOLDNER, M.D.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

BRIEF OF UNIVERSITY FACULTY FOR LIFE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Ginsberg v. New York, 390 U.S. 629 (1968) 18

H.L. v. Matheson, 450 U.S. 398 (1981) 3, 4, 5

Hodgson v. Minnesota, 497 U.S. 417 (1990) 4, 5

Lambert v. Wicklund, 520 U.S. 292 (1997) 4

Lawrence v. Texas, 539 U.S. 558 (2003) 9, 11, 12

Meyer v. Nebraska, 262 U.S. 390 (1923) 2

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 8

Parham v. J.R., 442 U.S. 584 (1979) 3, 4

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 2

Planned Parenthood v. Casey, 505 U.S. 833 (1992) ... 4, 12, 13

Planned Parenthood of Northern New England v. Heed, 390 F.3d 53 (1st Cir. 2004) 20, 21, 22

Planned Parenthood of Northern New England v. Heed, 296 F.Supp. 2d 59 (D.N.H. 2003) 22

Prince v. Massachusetts, 321 U.S. 158 (1944) 2

Quilloin v. Walcott, 434 U.S. 246 (1978) 3

Roper v. Simmons, 125 S.Ct. 1183 (2005) 9

Societe Nationale Industrielle Aerospatiale et al. v. U.S. Dist. Ct. for the Southern Dist. of Iowa, 482 U.S. 522 (1987) 21

Stanley v. Illinois, 405 U.S. 645 (1972) 3

Troxel v. Granville, 530 U.S. 57 (2000) 2

Wisconsin v. Yoder, 406 U.S. 205 (1972) 3

TABLE OF AUTHORITIES – Continued

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UNITED STATES LEGISLATIVE AND ADMINISTRATIVE MATERIALS

S. Res. 133, 104th Cong., 1995 WL 356610 (1995) 6

140 Cong. Rec. S13927-04, 1994 WL 543936 (1994) 7

141 Cong. Rec. S3081-02, 1995 WL 74816 (1995) 6

148 Cong. Rec. S5716-04, 2002 WL 133217 (2002) 6

148 Cong. Rec. S5717-01, 2002 WL 1332171 (2002) 6

U.S. Department of State, Office of International Women's Issues, at http://www.state.gov/g/wi/ (last visited July 29, 2005) 7

U.S. Department of State, U.S. Explanation of Position on the Declaration, Mar. 22, 2005, at http://www.state.gov/p/io/uncnf/43759.htm (last visited Aug. 1, 2005) 8, 16

FOREIGN JUDGMENTS AND STATUTES

Beschlu¤ des Bundersverfassungsgerichts vom. 28 Mai 1993 – 2BvF 2/90 (BGBI. I S 820) (Decision of the Second Senate, German Constitutional Court of May 28, 1993), *translation available at* http://www.hrcr.org/safrica/life/39bverfge1.html 12

Malta, Criminal Code, §§ 241-43A (2003), at http://cyber.law.harvard.edu/population/ 11

JUDGMENTS OF INTERNATIONAL COURTS

Open Door Counseling Ltd. v. Ireland (14234/88, 14253/88), 15 E.H.R.R. 244, 1992 WL 895454 (Eur. Ct. H.R. 1992) 17

TABLE OF AUTHORITIES – Continued

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Society for the Protection of Unborn Children v. Grogan, (C-159/90), 3 C.M.L.R. 849, 1991 WL 839064 (Eur. Ct. Just. 1991) 17

Vo v. France, (53924/00), 40 E.H.R.R. 12, 2004 WL 1808739 (Eur. Ct. H.R. 2004) 17

TREATIES AND PROTOCOLS

American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (1978), *reprinted at* 9 I.L.M. 673 (1970) 13, 14

African Union, Protocol on the Rights of Women in Africa, July 11, 2003, at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol%20on%20the%20Rights%20of%20Women.pdf 14

Convention on the Elimination of All Forms of Discrimination Against Women, Jan. 22, 1980, U.N. Doc. A/52/38, *reprinted at* 19 I.L.M. 33 (1980) 7

Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/44/49, *reprinted at* 28 I.L.M. 1448 (1989) 6, 16

Protocol No. 7 annexed to the Treaty of Accession 2003, Apr. 16, 2003, E.U. Doc. AA2003/ACT/P1, at http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/ treaty_accession_24.htm 11

Protocol No. 17 annexed to the Maastricht Treaty and to the Treaties Establishing the European Communities, 31 I.L.M. 247 (1992) 11

TABLE OF AUTHORITIES – Continued

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UN Report of the International Conference on Population and Development, Oct. 18, 1994, U.N. Doc. A/CONF.171/13, at http://www.un.org/popin/icpd/conference/offeng/poa.html 15, 16

United Nations Fourth World Conference on Women: Declaration and Platform for Action, A/Conf.177/20 & A/Conf.177/20/Add.1, Sep. 1995, *reprinted at* 35 I.L.M. 401 (1996) 7, 8, 16

United Nations, Reservations and Understandings Regarding the Fourth World Conference on Women, Sep. 15, 1995, Press Release WOM/BEI/38, at http://www.un.org/esa/gopher-data/conf/fwcw/conf/pre/21162600.txt 16

TREATISES AND LAW REVIEW ARTICLES

Alicia Czerwinski, *Sex, Politics, and Religion: The Clash Between Poland and the European Union over Abortion*, 32 Denv. J. Int'l L. & Pol'y 653 (2004) 10, 11

Chad M. Gerson, Development, *Toward an International Standard of Abortion Rights: Two Obstacles*, 5 Chi. J. Int'l L. 753 (2005) 10, 11

Abby F. Janoff, *Rights of the Pregnant Child vs. Rights of the Unborn Under the Convention on the Rights of the Child*, 22 B.U. Int'l L.J. 163 (2004) 16

Peta-Gaye Miller, *Member State Sovereignty and Women's Reproductive Rights: The European Union's Response*, 22 B.C. Int'l & Comp. L. Rev. 195 (1999) 11

TABLE OF AUTHORITIES – Continued

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Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 San Diego L. Rev. 635, (1997) 21

Contemporary Practice of the United States Relating to International Law (Sean D. Murphy ed.), 96 A.J.I.L. 956 (2002) 7

STUDIES AND REPORTS

Center for Reproductive Rights, Abortion and the Law: Ten Years of Reform (2005), at http://www.reproductiverights.org/pdf/pub_bp_abortionlaws10.pdf 10

Center for Reproductive Rights, The World's Abortion Laws (2004), at http://www.reproductiverights.org/pub_fac_abortion_laws.html 10, 15

OTHER DOCUMENTS

Four Treaties Pertaining to Human Rights, 1966 U.S.T. LEXIS 521 14

Elizabeth Bryant, *Abortion Foes Get More Vocal as EU Expands*, S.F. Chron., Mar. 29, 2005, at 1, at http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/03/29/MNGSNC03M21.DTL 10

Elizabeth Bryant, *Portuguese Parties Split on Abortion but Little Else*, Wash. Times, Feb. 19, 2005, at http://www.washtimes.com/upi-breaking/20050218-010804-3725r.htm 17

TABLE OF AUTHORITIES – Continued

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European Union, European Union Member States, at http://europa.eu.int/abc/governments/index_en.htm (last visited July 13, 2005) 10

Organization of American States, Member States and Permanent Missions, at http://www.oas.org/documents/eng/memberstates.asp (last updated Feb. 25, 2005) 13

Organization of American States, Signatures and Current Status of Ratifications, at http://www.cidh.oas.org/Basicos/basic4.htm (last visited July 28, 2005) 14

UK Presidency of the EU, Enlargement of the EU, at http://www.eu2005.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1109176230949 17

UNICEF, The Convention, at http://www.unicef.org/crc/crc.htm (last visited July 13, 2005) 6

UNICEF, FAQ, at http://www.unicef.org/crc/crc.htm (last visited July 13, 2005) 6

United Nations, List of Member States, at http://www.un.org/Overview/unmember.html (Feb. 24, 2005) 10

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

University Faculty for Life is an international group of faculty in various disciplines who respect the value of human life from its inception to natural death. Since its founding in 1989, the organization has promoted multi-disciplinary dialogue and collaboration among university faculty on abortion, infanticide, and euthanasia. *Amicus* provides this brief in hopes of assisting the Court in understanding the international law regarding parental involvement in a minor's decision to obtain an abortion.

SUMMARY OF ARGUMENT

American law has consistently recognized the relationship between strong families and the formation of civic virtues necessary to maintain a democratic republic. The present case presents the issue of parental involvement in circumstances raising some of the most profound questions both the individual and the community encounter. Unlike other questions, for which a strong consensus exists, resort to international law regarding abortion provides little guidance for this Court. To the extent such guidance does exist, it supports the right of parents to be involved in the care and treatment of their daughters, and thus supports the petitioner in this case.

[1] No counsel for any party authored any portion of this brief. No persons other than *amicus curiae*, their members, or their counsel have made a monetary contribution to the preparation and submission of this brief. The written consents of the parties will be filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

ARGUMENT

I. THE UNIQUE AND WELL ESTABLISHED POLICIES OF THE UNITED STATES PERTAINING TO BOTH THE FAMILY AND ABORTION DISCOURAGE THE APPLICATION OF INTERNATIONAL LAW IN THIS CASE.

A. The United States has a longstanding tradition of promoting and protecting the rights and obligations of parents to direct the care, nurture, and upbringing of their children, even within the context of abortion.

The United States has consistently taken the position that parents are primarily responsible to guide, support, and direct their minor children. The Fourteenth Amendment "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). This fundamental liberty interest is one of the oldest interests protected by American law,[2] and this Court's repeated affirmations have firmly established it as having constitutional

[2] *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that a State law prohibiting the teaching of foreign languages in public schools unconstitutionally infringes upon the liberty interests of parents and teachers); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (finding the State may not abrogate parents' rights to direct their children's education) ("[Parents] have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

magnitude.[3] Within this right is the right of a parent to direct the medical care of a minor child:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has

[3] *See, e.g., H.L. v. Matheson*, 450 U.S. 398, 410 (1981) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority . . . to direct the rearing of their children is basic in the structure of society."); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected . . . broad parental authority over minor children. Our cases have consistently followed that course."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents . . . is now established beyond debate as an enduring American tradition."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect . . . ").

> recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584, 602 (1979).

The mere fact that a small number of parents may act against the best interests of their children "is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id.* at 602-03 (1979) (citations and quotations omitted). Although "immature minors often lack the ability to make fully informed choices," their "parents possess what [they] lack in maturity, experience, and capacity for judgment." *H.L. v. Matheson*, 450 U.S. 398, 409 (1981); *Parham v. J.R.*, 442 U.S. 584, 602 (1979). In short, it is presumed that parents act in the best interests of their children and with superior discernment. Consequently, American law has always recognized parents' primary authority over their children's medical care.

Laws requiring parental involvement prior to the performance of an abortion on a minor are merely a limited application of this general rule to a specific procedure. This Court has upheld both parental notification and consent ("parental involvement") requirements for minors seeking abortions. *See, e.g., Lambert v. Wicklund*, 520 U.S. 292 (1997) (upholding a Montana law requiring parental notification for minors seeking abortions); *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) ("Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian,"); *Hodgson v. Minnesota*, 497 U.S. 417

(1990) (upholding a Minnesota law requiring parental notification and a forty-eight hour waiting period for minors seeking abortions); *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (noting that the mere requirement of parental notification for minors seeking abortions is constitutional, even though it may impose a burden on some minors). "Although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)). As applied to minors, parental involvement laws further "the important considerations of family integrity and protecting adolescents . . . identified in *Bellotti II*." *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).

As Justice Stevens has observed, this Court "has never challenged a State's reasonable judgment that [a minor's abortion] decision should be made after notification to and consultation with a parent." *Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990) (Stevens, J. concurring). The lower courts erroneously held the New Hampshire parental notification law unconstitutional, which is identical in pertinent part to the Minnesota law upheld by this Court in *Hodgson v. Minnesota*.

B. The United States has repeatedly rebuffed international attempts to interfere with its unique approach to the abortion issue.

The United States has always preserved its sovereignty over family law, specifically concerning regulation

of reproductive rights. For example, the United States has never ratified the United Nations Convention on the Rights of the Child ("CRC"),[4] largely due to the credible belief that it would subvert the authority of parents to exercise important responsibilities towards their children by conferring upon children freedom from parental restraint in all areas of their lives.[5] The United States has ratified two of the CRC's optional protocols, expressly stating in each instance that ratification of the protocol did not in any way imply ratification of the CRC itself.[6]

[4] U.N. Doc. A/44/49, *reprinted at* 28 I.L.M. 1448 (1989) [hereinafter CRC].

[5] The CRC attempted to create a legally-binding international standard of children's rights. *See* UNICEF, The Convention, at http://www.unicef.org/crc/crc.htm (last visited July 13, 2005). The UN General Assembly unanimously approved the CRC on November 20, 1989. *See* CRC, 28 I.L.M. at 1448. The CRC has never been forwarded to the Senate for ratification due to intense objection from the American people over its interference with parents' rights. *See* 141 Cong. Rec. S3081-02, 1995 WL 74816 (1995) (statement of Sen. Dole) ("I have received thousands of calls from all over the country in opposition to [the CRC]. My office has not received one call for it. . . . Could [the CRC] be interpreted to limit the ability of parents to decide for themselves how best to raise their children?"); S. Res. 133, 104th Cong., 1995 WL 356610 (1995) ("Resolved, That it is the sense of the Senate that – (1) the [CRC] is incompatible with the God-given right and responsibility of parents to raise their children . . . 4) the President should not sign and transmit to the Senate that fundamentally flawed Convention."). To date, the United States has not ratified the CRC. *See* UNICEF, FAQ, at http://www.unicef.org/crc/crc.htm.

[6] *See* 148 Cong. Rec. S5716-04, 2002 WL 1332170 (2002) ("The United States understands that the United States assumes no obligations under the [CRC] by becoming a party to the Protocol [on Involvement of Children in Armed Conflict]."); 148 Cong. Rec. S5717-01, 2002 WL 1332171 (2002) ("The United States understands that the United States assumes no obligations under the [CRC] by becoming a party to the Protocol [on the Sale of Children, Child Prostitution and Child Pornography].").

Notwithstanding the fact that the United States is an international leader in efforts to eliminate gender bias,[7] the United States has never ratified the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),[8] clearly indicating intent to retain national control over family planning and reproductive services.[9] In September 1995, the UN unanimously adopted the Beijing Declaration and Platform for Action ("Beijing Declaration"),[10] which establishes an international standard of women's rights, including reproductive

[7] *See* U.S. Department of State, Office of International Women's Issues, at http://www.state.gov/g/wi/ (last visited July 29, 2005) ("The United States is in the forefront of advancing women's causes around the world, helping them become full participants in their societies through various initiatives and programs that help increase women's political participation and economic opportunities and support women and girls' access to education and health care.").

[8] U.N. Doc. A/52/38, *reprinted at* 19 I.L.M. 33 (1980) [hereinafter CEDAW]. CEDAW requires broad regulation of private conduct, especially within the family. *See id.* at 36-37 (articles 2-3, 5). In 1994, the Senate Foreign Relations Committee recommended ratification of the treaty subject to certain reservations, including that the United States would retain national sovereignty over regulation of private conduct. *See* 140 Cong. Rec. S13927-04, 1994 WL 543936 (1994). The Senate never took action on that recommendation. *See Contemporary Practice of the United States Relating to International Law* (Sean D. Murphy ed.), 96 A.J.I.L. 956, 972 (2002). Since then, the United States has not ratified CEDAW.

[9] *See* 140 Cong. Rec. S13927-04, 1994 WL 543936 (1994) ("The Senate's advice and consent is subject to the following understandings: . . . that Article 12 permits State Parties to determine which health care services are appropriate in connection with family planning, pregnancy . . . ").

[10] United Nations Fourth World Conference on Women: Declaration and Platform for Action, A/Conf.177/20 (1995) & A/Conf.177/20/Add.1, *reprinted at* 35 I.L.M. 401 (1996) [hereinafter Beijing Declaration].

rights.[11] Again, the United States reserved national sovereignty over abortion law, and in March 2005, the United States reaffirmed its previous qualified support, provided the Declaration is not construed to create international abortion rights.[12]

In sum, the United States has successfully resisted international efforts seeking to replace America's long-standing recognition of family and parental authority with the present-day experiment in some foreign nations with radical individualism. *Cf. Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). In light of the consistent rejection of attempts to globalize the issues of family law by the legislative and executive branch, and the divisive history of contemporary abortion jurisprudence in this country, international law is ill-suited to assist this Court in addressing the issues presented by this case.

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[11] *See* Beijing Declaration, A/Conf.177/20 (1995) & A/Conf.177/20/Add.1, ch. IV, § C, ¶¶. 94-97, 106, *reprinted in* 35 I.L.M. at 423-26.

[12] *See* U.S. Department of State, *U.S. Explanation of Position on the Declaration* (Mar. 22, 2005), at http://www.state.gov/p/io/uncnf/43759.htm ("We have stated clearly and on many occasions . . . that we do not recognize abortion as a method of family planning, nor do we support abortion in our reproductive health assistance. The United States understands that there is international consensus that the terms "reproductive health services" and "reproductive rights" do not include abortion or constitute support, endorsement, or promotion of abortion or the use of abortifacients."). When the United States originally signed the Beijing Declaration, it submitted a written statement interpreting the Declaration as creating a general obligation to implement "the Platform's recommendations overall, rather than a specific commitment to implement each element of the Platform." Beijing Declaration, A/Conf.177/20 (1995) & A/Conf.177/20/Add.135, ch. V, ¶. 30, 35 I.L.M. at 480.

C. Past instances justifying reliance on international law by this Court materially differ from the present case.

This Court's past decisions in *Roper v. Simmons*, 125 S.Ct. 1183 (2005), and *Lawrence v. Texas*, 539 U.S. 558 (2003), have both relied upon international law. However, neither case is sufficiently analogous to justify the application of international law in the present case.

This case materially differs from *Roper* in that it lacks the benefit of an international consensus on the issue of abortion rights.[13] In fact, the abortion issue as a whole remains unsettled and controversial in the international

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[13] *Roper* repeatedly recognized the clear and overwhelming international consensus against the juvenile death penalty.

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that *the United States is the only country in the world* that continues to give official sanction to the juvenile death penalty. . . . Article 37 of the United Nations Convention on the Rights of the Child, which *every country in the world* has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. . . . *No ratifying country* has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. . . . In the 56 years that have passed since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established.

See id., 125 S.Ct. at 1198-1200 (citations omitted and emphasis added).

community.[14] The wide range of abortion restrictions among various countries has prevented international institutions from taking a position on the issue.[15] For example, neither the United Nations nor the European Union has enacted any legislation directly governing the abortion practices of member nations.[16] This phenomenon is largely attributable to the need to accommodate members – for example, Ireland, Malta, and Poland – that vehemently oppose the more permissive abortion laws of some of their neighbors.[17] This issue is so divisive that the

[14] *See* Elizabeth Bryant, *Abortion Foes Get More Vocal as EU Expands*, S.F. Chron., Mar. 29, 2005, at 1, at http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/03/29/MNGSNC03M21.DTL (noting the abortion controversy in the EU); Center for Reproductive Rights, *Abortion and the Law: Ten Years of Reform* (Feb. 2005), at http://www.reproductiverights.org/pdf/pub_bp_abortionlaws10.pdf (comparing liberalization of abortion laws in some countries with increasing restrictions in others). The United States is one of only fifty-four countries permitting abortion without restriction as to reason, while seventy-two countries either prohibit abortion completely or allow it only to save the mother's life. *See* Center for Reproductive Rights, The World's Abortion Laws (June 2004), at http://www.reproductiverights.org/pub_fac_abortion_laws.html.

[15] *See* Chad M. Gerson, *Toward an International Standard of Abortion Rights: Two Obstacles*, 5 Chi. J. Int'l L. 753, 753 ("For a variety of reasons, many international organizations have carefully avoided taking positions on positive abortion rights.").

[16] *See* Alicia Czerwinski, *Sex, Politics, and Religion: The Clash Between Poland and the European Union over Abortion*, 32 Denv. J. Int'l L. & Pol'y 653, 660 (2004) (noting that the EU lacks direct legislation legalizing abortion and instead defers to the legislation of its member states).

[17] Ireland, Malta, and Poland are all members of both the UN and the EU. *See* United Nations, List of Member States, at http://www.un.org/Overview/unmember.html (Feb. 24, 2005); European Union, European Union Member States, at http://europa.eu.int/abc/governments/index_en.htm (last visited July 13, 2005). Ireland permits abortion only to save the life of the mother. *See* Center for Reproductive

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European Parliament did not approve its own *Annual Report 2003 on Fundamental Rights in the European Union* because of a dispute over certain paragraphs encouraging the member nations to liberalize their abortion laws.[18]

Lawrence's rationale likewise fails to support the use of international law in this case. While *Lawrence* involved government interference in the private sexual conduct of two consenting adults,[19] the present case focuses on the right of a minor to make a secret decision to obtain an

Rights, The World's Abortion Laws (June 2004), at http://www.reproductiverights.org/pub_fac_abortion_laws.html. The country has acted to ensure that its abortion laws will never be affected by EU legislation. *See* Protocol No. 17 annexed to the Maastricht Treaty and to the Treaties Establishing the European Communities, 31 I.L.M. 247, 362 (1992); *see also* Peta-Gaye Miller, 22 B.C. Int'l & Comp. L. Rev. 195, 206-07 (discussing Ireland's abortion laws in the context of the EU). In Malta, abortion is illegal. *See* Malta, Criminal Code, §§ 241-43A (2003), at http://cyber.law.harvard.edu/population/. When Malta became a member of the EU in 2004, it annexed a protocol to its accession treaty that allows it to maintain its current abortion law free from EU interference. *See* Protocol No. 7 annexed to the Treaty of Accession 2003 (Apr. 16, 2003), at http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/treaty_accession_24.htm. Article 38 of Poland's constitution prohibits abortion, although Poland has not yet sought a protocol insulating its abortion law from EU regulation. *See* Alicia Czerwinski, *Sex, Politics, and Religion: The Clash Between Poland and the European Union over Abortion*, 32 Denv. J. Int'l L. & Pol'y 653, 665 (2004).

[18] *See* Chad M. Gerson, *Toward an International Standard of Abortion Rights: Two Obstacles*, 5 Chi. J. Int'l L. 753, 759 (2005).

[19] *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.").

abortion.[20] Furthermore, *Lawrence* relied upon decisions by the European Court of Human Rights to support its conclusion that precedent in the United States was "at odds" with Western civilization.[21] Here however, neither the European Court of Human Rights nor the European Court of Justice has authored opinions establishing a fundamental right to abortion or determining the validity of parental involvement laws. Thus, these significant discrepancies between the legal contexts of *Lawrence* and the present case render *Lawrence* inapplicable here.

In contrast to the conflicting state of abortion regulation in the international community, domestic law is settled. The United States has a valuable tradition of promoting the family and the primary authority of parents. Furthermore,

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[20] *Cf.* Beschlu□ des Bundersverfassungsgerichts vom. 28 Mai 1993 – 2BvF 2/90 (BGBI. I S 820) (Decision of the Second Senate, German Constitutional Court of May 28, 1993), *translation available at* http://www.hrcr.org/safrica/life/39bverfge1.html (*see* pt. II, § 2) ("[T]he termination of a pregnancy always means the destruction of unborn life. . . . [T]he decision must favor the protection of the fetus' life over the right of self-determination of the women. [The women] may be limited in some potential personal developments by pregnancy, birth, and childrearing [and her right to self-determination may thus be impaired]. The unborn life, however, gets destroyed by the termination of a pregnancy. Pursuant to the principle of the most careful balancing of competing constitutionally protected positions . . . the protection of the nasciterus's life must be granted priority. This priority principally lasts for the entire duration of the pregnancy . . . "); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming *Roe's* essential holding that the state has a legitimate interest in protecting potential human life); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The present case does not involve minors. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

[21] *See Lawrence v. Texas*, 539 U.S. 558, 573, 576 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981), and subsequent decisions of the European Court of Human Rights).

the United States has resisted international efforts to alter American policies at the expense of the family. Reference to international law, which itself contains widely divergent regulatory regimes, would needlessly disrupt established American abortion law.[22]

II. EVEN IF INTERNATIONAL ABORTION LAW IS APPLIED, APPLICABLE STANDARDS ESTABLISH THAT RESPONDENTS HAVE NOT SUFFERED ANY INFRINGEMENT OF THEIR RIGHTS.

A. The only international organizations to have directly addressed abortion rights favor much greater restrictions than those contained in the New Hampshire statute.

Only two international organizations have promulgated substantive abortion policies. On November 22, 1969, the Organization of American States ("OAS"), which includes the United States,[23] adopted the American Convention on Human Rights ("ACHR").[24] Article 4 of the ACHR establishes legal protection for the right to life of the unborn child from the moment of conception, effectively discouraging abortion

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[22] *See Planned Parenthood v. Casey*, 505 U.S. 833, 843 (1992) ("Liberty finds no refuge in a jurisprudence of doubt.").

[23] *See* Organization of American States, Member States and Permanent Missions (Feb. 25, 2005), at http://www.oas.org/documents/eng/memberstates.asp ("All 35 independent countries of the Americas have ratified the OAS Charter and belong to the Organization. Cuba remains a member, but its government has been excluded from participation in the OAS since 1962.").

[24] O.A.S. Treaty Series No. 36 (Nov. 22, 1969), *reprinted at* 9 I.L.M. 673 (1970) [hereinafter ACHR].

at all stages of pregnancy.[25] To date, the United States and twenty-seven other member states, have signed the ACHR.[26] Also, the African Union ("AU") has established abortion rights in its Protocol on the Rights of Women in Africa.[27] However, the Protocol is quite limited in that it does not permit elective abortions nor does it create a minor's right to an abortion with or without parental involvement.[28]

The New Hampshire statute not only permits minors to obtain abortions but also allows them to do so without notifying their parents in certain circumstances. Also, the New Hampshire law is part of a broader regulatory scheme that is far more permissive than its international counterparts. Based on international standards, this

[25] *See* ACHR, O.A.S. Treaty Series No. 36, ch. II, art. 4, § 1 (Nov. 22, 1969), *reprinted at* 9 I.L.M. at 675.

[26] *See* Organization of American States, Signatures and Current Status of Ratifications, at http://www.cidh.oas.org/Basicos/basic4.htm (last visited July 28, 2005). President Carter transmitted the ACHR to the Senate on February 23, 1978. *See Four Treaties Pertaining to Human Rights*, 1966 U.S.T. LEXIS 521, *1-2 (containing President Carter's letter of transmittal to the Senate). For a summary of the ACHR's legislative history, see Treaty Number 95-21 available from the treaties database of the Thomas online legislative information website at http://thomas.loc.gov/home/treaties/treaties.htm (last visited July 29, 2005).

[27] *See* African Union, *Protocol on the Rights of Women in Africa*, art. 14, § 2 (July 11, 2003), at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol%20on%20the%20Rights%20of%20Women.pdf.

[28] *See* African Union, *Protocol on the Rights of Women in Africa*, art. 14, § 2, at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol%20on%20the%20Rights%20of%20Women.pdf.

statute does not infringe upon a minor's right to obtain an abortion.

B. Both the United Nations and the European Union have declined to articulate a position on the issue.

The United Nations' individual member states have always enjoyed sovereignty to promulgate abortion laws free from the interference or input of other members. In fact, no United Nations treaty has ever purported to institute international abortion regulations, nor has the United Nations taken an explicit position on the abortion rights of minors. Instead, in an attempt to effect a compromise among the wide range of abortion policies of the ratifying states,[29] international treaties contain only general references to health and reproductive rights and are rife with statements from signatories reserving national authority over abortion law.[30] As a result, the United

[29] Of the UN's one hundred ninety-two member states, seventy-two ban abortion completely or allow it only to save the mother's life. *See* Center for Reproductive Rights, The World's Abortion Laws (June 2004), at http://www.reproductiverights.org/pub_fac_abortion_laws.html. Fifty-five add some sort of health exception, and fourteen also permit abortion on socioeconomic grounds. *See id.* Fifty-four countries permit abortion at some stage of pregnancy without restriction as to reason. *See id.*

[30] In 1994, the UN addressed the topic of reproductive rights at the International Conference on Population and Development in Cairo, Egypt. *See* United Nations Report of the International Conference on Population and Development, U.N. Doc. A/CONF.171/13, tit. I, ch. VII, § B, ¶. 7.16 (Oct. 18, 1994), at http://www.un.org/popin/icpd/conference/offeng/poa.html [hereinafter Cairo Conference] ("All countries should take steps to meet the family-planning needs of their populations . . . and should . . . seek to provide universal access to a full range of safe and reliable family-planning methods and to related reproductive

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Nations provides no instructive guidance on abortion in general, and absolutely no pronouncements on parental involvement laws.

Like the United Nations, the European Union has failed to elicit any sort of consensus on abortion rights. Abortion legislation is not within its competency, but rather falls solely within the province of individual member

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health services *which are not against the law*.") (emphasis added). However, the Conference failed to reach any consensus regarding international abortion rights. *See id.*, tit. III, ch. V (listing the written reservations of sixteen countries, preserving national sovereignty over reproductive rights, and in some cases, asserting the right to life of unborn children from the moment of conception). One year later, the Beijing Declaration built upon the foundation provided by the Cairo Conference. *See* Beijing Declaration, A/Conf.177/20 (1995) & A/Conf.177/20/Add.1, *reprinted in* 35 I.L.M. 401 (1996). Again, various countries entered reservations similar to those at the Cairo Conference, and no consensus on abortion rights was reached. *See id.* at 472 (containing chapter V of the Beijing Declaration). Furthermore, the United States has since reiterated its understanding that the Beijing Declaration does not create abortion rights. *See* U.S. Department of State, *U.S. Explanation of Position on the Declaration* (Mar. 22, 2005), at http://www.state.gov/p/io/uncnf/43759.htm. Finally, the preamble to the CRC, which deals with children's rights, states that "the child . . . needs special safeguards and care, including appropriate legal protection, *before as well as after birth*." CRC, Preamble, 28 I.L.M. 1448, 1448 (1989) (emphasis added). This language has fueled the abortion controversy in the UN because some nations construed it as creating a right to life for the unborn while others expressly reserved the right to retain their liberal abortion laws. *See* Abby F. Janoff, *Rights of the Pregnant Child vs. Rights of the Unborn Under the Convention on the Rights of the Child*, 22 B.U. Int'l L.J. 163, 174-76 (2004) (discussing ratification of the CRC and reservations of various states concerning abortion laws); Office of the United Nations High Commission for Human Rights, Declarations and Reservations to the Convention on the Rights of the Child, at http://www.ohchr.org/english/countries/ratification/11.htm#reservations (last visited July 29, 2005) (listing the reservations and objections of CRC signatories).

states.[31] Currently, nine of the European Union's twenty-five members place some restrictions on abortion, including the recently admitted nations of Malta, Poland, and Cyprus.[32] With no direction on the issue from the European Parliament, the European Union's courts have done little to reconcile the conflicting views represented in the European Union's membership. In one anticipated decision, the European Court of Human Rights ruled in June of 2004 that Article 2 of the European Convention on Human Rights does not confer a right to life upon the fetus.[33] The court has also upheld the rights of health clinics in Ireland to encourage and assist pregnant women in traveling abroad for abortions, leaving intact the Irish prohibition of abortion in almost all cases.[34] For its part, the European Court of Justice has held that abortion is a service within the meaning of Article 60 of the Treaty Establishing the European Economic Community, thereby creating a right to disseminate information pertaining to abortion services.[35] Most significantly, all of these cases

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[31] Elizabeth Bryant, *Portuguese Parties Split on Abortion but Little Else*, Wash. Times, Feb. 19, 2005, at http://www.washtimes.com/upi-breaking/20050218-010804-3725r.htm.

[32] *See* UK Presidency of the EU, Enlargement of the EU at http://www.eu2005.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1109176230949 (listing the accession dates of the EU member states); Elizabeth Bryant, Abortion Foes Get More Vocal as EU Expands, S.F. Chron., Mar. 29, 2005, p. 1, at http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/03/29/MNGSNC03M21.DTL (last updated July 4, 2005) (discussing the abortion controversy in the EU).

[33] *See Vo v. France* (53924/00), 40 E.H.R.R. 12, 2004 WL 1808739 (Eur. Ct. H.R. 2004).

[34] *See Open Door Counseling Ltd. v. Ireland* (14234/88, 14253/88), 15 E.H.R.R. 244, 1992 WL 895454 (Eur. Ct. H.R. 1992).

[35] *See Society for the Protection of Unborn Children v. Grogan*, (C-159/90), 3 C.M.L.R. 849, 1991 WL 839064 (Eur. Ct. Just. 1991).

declined the invitation to issue a broad ruling on abortion rights in the European Union, and collectively, they demonstrate the European Union's unwillingness and inability to overrule the individual states' policies in the area.

The New Hampshire statute does not curtail any abortion rights guaranteed under current international standards. Furthermore, the United Nations and the European Union have declined to promulgate universal or regional abortion laws. Instead, both organizations have adopted a laissez faire approach to abortion regulation, recognizing member states' right to promulgate their own policies.

III. UNDER THE STANDARDS ESTABLISHED BY THE ABORTION LAWS OF INDIVIDUAL NATIONS, RESPONDENTS HAVE FAILED TO SUFFER ANY INJURY TO THEIR RIGHTS.

A. Foreign law supports the established right of parents to advise their children regarding an abortion decision.

As this Court has stated, "[P]arents and others ... who have [the] *primary responsibility for children's well-being* are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (emphasis added). Counsel for *amicus curiae* surveyed abortion policies in one hundred ninety-three foreign countries in an attempt to identify a standard that may provide guidance on the propriety of such laws within the context of abortion regulation. Only fifteen countries worldwide – a scant eight percent – allow minors to access abortion services free from any safeguards

designed to ensure that the procedure is in the child's best interests.[36] By comparison, twenty-five require some form of parental involvement for minors seeking abortions,[37] and another twenty-two impose comparable restrictions on all abortion procedures.[38] The remaining one hundred thirty-one countries have enacted more restrictive abortion laws than those of the United States.[39]

As this Court has repeatedly recognized, the United States has always entrusted the care and nurture of children primarily to their parents, who are the people most able and likely to pursue the child's best interests. Pregnant minors need their parents' loving support and mature guidance to help them cope with the stress and difficulties of pregnancy.

B. Under foreign abortion laws, respondents have not alleged any cognizable injuries to their rights.

Ninety-two percent of countries surveyed have enacted abortion regulation that is similar to, or more restrictive than, the New Hampshire statute.[40] This fact

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[36] *See* Appendix A – Parental Involvement Laws in Permissive Countries, Comparison by Numbers.

[37] *See* Appendix A – Parental Involvement Laws in Permissive Countries, Countries with Involvement Laws.

[38] *See* Appendix B – Comparable Restrictions in Permissive Countries.

[39] *See* Appendix A – Parental Involvement Laws in Permissive Countries, Comparison by Numbers. A restrictive country is any country that does not permit abortion on demand or for socioeconomic reasons.

[40] *See* Appendix A – Parental Involvement Laws in Permissive Countries, Comparison by Numbers. Sixty-eight percent of countries

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alone suggests the statute generally comports with foreign standards. Analysis proves that under foreign abortion law, respondents have not suffered any injuries to their legal rights.

First and foremost, the absence of an explicit health exception and a broad death exception does not constitute a violation of rights.[41] In fact, the majority of countries with parental involvement laws have not expressly incorporated any emergency health or death exception and instead, must rely on other legal provisions to protect minors seeking abortions.[42] Of the eleven countries that have incorporated an explicit emergency exception, four of them use language comparable to that of the New Hampshire statute.[43] Only seven countries – a mere four percent of foreign nations – require a more lenient emergency exception than that contained in the New Hampshire

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prohibit all women, including minors, from obtaining abortions for socioeconomic reasons or on demand. Another twenty-four percent have parental involvement laws or other comparable restrictions that affect minors in a manner similar to, or more restrictive than, the New Hampshire statute.

[41] The First Circuit determined the statute's lack of an explicit health exception renders it unconstitutional and also that the statute's death exception contains too narrow of a time requirement and impermissibly fails to safeguard a physician's good-faith medical judgments. *See Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 62, 64 (1st Cir. 2004).

[42] *See* Appendix A – Parental Involvement Laws in Permissive Countries, Countries with Involvement Laws.

[43] *See* Appendix A – Parental Involvement Laws in Permissive Countries, Countries with Involvement Laws (listing countries with "Strict" emergency exception standards). Also, *see* Appendix C for the statutory language of the emergency exceptions contained in the parental involvement laws of the eleven countries that have provided explicit emergency exceptions to their involvement laws.

statute.[44] Furthermore, only two percent of foreign nations have incorporated both judicial bypass and emergency exceptions in their parental involvement laws.[45] The absence of emergency exceptions and bypasses within foreign involvement laws is the norm. By foreign standards, respondents cannot attribute any injury to the New Hampshire statute because it provides both an emergency exception and a bypass.

Nor can respondents sustain a valid complaint concerning the substance of the statute's death exception. Although the Court of Appeals for the First Circuit found the exception to be inadequate,[46] if this Court were to apply it, foreign law would result in the reversal of the judgments of the lower courts. While language and other cultural barriers make word-for-word comparisons difficult,[47] the death exception's language falls generally within

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[44] *See* Appendix A – Parental Involvement Laws in Permissive Countries, Countries with Involvement Laws (listing countries with "Intermed." or "Low" emergency exception standards).

[45] *See* Appendix A – Parental Involvement Laws in Permissive Countries, Comparison by Numbers.

[46] *See Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 64 (1st Cir. 2004).

[47] *See Societe Nationale Industrielle Aerospatiale et al. v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 482 U.S. 522, 538 n.23 (1987) ("The great object of an international agreement is to define the common ground between sovereign nations. Given the gulfs of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters." (citations and quotations omitted); Sanchez, Gloria M., *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 San Diego L. Rev. 635, 645, 652 (1997) ("Culture and language are difficult to study. . . . [T]he nature and properties of culture and language, and their important role within the context of the

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the range of wording used in foreign countries' emergency exceptions.[48]

More importantly, like the New Hampshire death exception, none of these other exceptions safeguards a physician's good faith medical judgments.[49] These similarities confirm that the New Hampshire statute contains an adequate death exception, which under foreign standards, does not violate any of respondents' legal rights.

Finally, confidential judicial bypasses find no parallel in foreign law. Of the few countries that permit bypasses of parental involvement laws, none has enacted any sort of corresponding confidentiality requirement.[50] Of course, both the district court and the appeals court declined to determine the validity of the statute's confidentiality requirement.[51] This Court need not reach this issue either because respondents lack standing in this case.

Foreign law provides an additional basis for respecting the established rights of parents in the United States

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study of law, are difficult to conceptualize. The individual may unwittingly superimpose her cultural interpretation on the foreign legal system which will create problems because she failed to examine her cultural assumptions.").

[48] To read the statutory language of the foreign laws referred to in this paragraph, *see* Appendix C – Statutory Language of Emergency Exceptions.

[49] To read the statutory language of the foreign laws referred to in this paragraph, *see* Appendix C – Statutory Language of Emergency Exceptions.

[50] *See* Appendix A – Parental Involvement Laws in Permissive Countries, Countries with Involvement Laws.

[51] *See Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 64 (1st Cir. 2004); *Planned Parenthood of Northern New England v. Heed*, 296 F.Supp. 2d 59, 67 (D.N.H. 2003).

to advise their children regarding the abortion decision. The New Hampshire statute seeks to protect this right by creating safeguards for minors seeking abortions. These safeguards are comparable to, or less restrictive than, those of ninety-two percent of foreign nations. In countries that have implemented parental involvement laws, the majority have not incorporated any bypass or emergency exception. Under the standards of foreign nations, respondents have suffered no judicially cognizable injury to their abortion rights.

CONCLUSION

For all of the foregoing reasons, *amicus* respectfully urges the Court to vacate the judgments of the lower courts and remand to the district court with instructions to dismiss the case for want of standing, or in the alternative to reverse the judgments of the lower courts.

Respectfully submitted,

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APPENDIX A

PARENTAL INVOLVEMENT LAWS IN PERMISSIVE COUNTRIES*

Summary of All Countries			
Albania	**Cuba**	N. Korea	*South Africa*
Armenia	**Czech Republic**	S. Korea	*St.Vincent-Grenadines*
Australia	**Denmark**	*Kyrgyzstan*	Sweden
Austria	**Estonia**	**Latvia**	*Switzerland*
Azerbaijan	Fiji	**Lithuania**	**Taiwan**
Bahrain	*Finland*	**Luxembourg**	*Tajikistan*
Barbados	*France*	**Macedonia**	*Tunisia*
Belarus	**Georgia**	**Mongolia**	**Turkey**
Belgium	**Greece**	Nepal	Turkmenistan
Belize	**Guinea-Bissau**	*Netherlands*	Ukraine
Bosnia Herzegovina	Hungary	**Norway**	*U.K. (except N. Ireland)*
Bulgaria	**Iceland**	Romania	Uzbekistan
Cambodia	**India**	Russian Federation	Vietnam
Cape Verde	**Italy**	**Slovakia**	**Yugoslavia**
China	Japan	**Slovenia**	*Zambia*
Croatia	**Kazakhstan**		

* For purposes of this brief, a permissive country is a country that permits abortion on socioeconomic grounds or on demand at some point during pregnancy.

- **The twenty-five countries in bold have parental involvement laws.**
- *The twenty-two italicized countries place comparable restrictions on all abortions. (See Appendix B).*
- The remaining fifteen countries have no safeguards for minors seeking abortions.

Countries with Involvement Laws

	Country	Bypass†	Confidential△	Emergency○	Standard◊	Sources∞
1	Estonia	No		No		1, 2
2	Georgia	No		No		2
3	Greece	No		No		2
4	India	No		No		2
5	Kazakhstan	No		No		1, 2
6	Latvia	No		No		1, 2
7	Lithuania	No		No		1, 2
8	Macedonia	No		No		1
9	Mongolia	No		No		1,2
10	Taiwan	No		No		1
11	Barbados	No		Yes	Strict	2
12	Bosnia Herzegovina	No		Yes	Strict	1
13	Croatia	No		Yes	Intermed	2
14	Cuba	No		Yes	Intermed	1, 2
15	Czech Republic	No		Yes	Strict	2
16	Guinea-Bissau	No		Yes	Low	1
17	Slovakia	No		Yes	Intermed	2
18	Turkey	No		Yes	Intermed	2
19	Denmark	Yes	No	No		2

20	Luxembourg	Yes	No	No		1, 2
21	Slovenia	Yes	No	No		1
22	Yugoslavia	Yes	No	No		1
23	Iceland	Yes	No	Yes	Low	2
24	Italy	Yes	No	Yes	Strict	2
25	Norway	Yes	No	Yes	Low	1

† Countries that have some sort of bypass, judicial or otherwise, to their laws will be noted by a "yes" in the "Bypass" column.

Δ For countries that have bypasses, the "Confidential" column indicates whether or not the particular bypass provision contains a confidentiality requirement.

○ For this brief, an emergency exception to a parental involvement law must be i) for the purpose of preserving the life or health (physical or mental) of the mother and ii) stated within, or incorporated by, the involvement provision itself. Countries that provide such an exception will be noted by a "yes" in the "Emergency" column.

◊ For countries that have emergency exceptions, the "Standard" column denotes the stringency of the criteria necessary to satisfy the exception. A designation of "Strict" indicates that the exception only applies when abortion is *necessary* to preserve the life of the mother or to prevent serious bodily injury. "Intermed" indicates abortion is allowed to alleviate any threat to the mother's life or health. "Low" indicates there simply must be some reason to perform the abortion without complying with the involvement requirement.

∞ Three sources provided the information used to create this table. They are listed below. The sources consulted for each country are noted by listing the corresponding footnote numbers in the "Sources" column.

[1] United Nations, Abortion Policies: A Global Review (2002), at http://www.un.org/esa/population/publications/abortion/profiles.htm

[2] Harvard Law School, Abortion Laws of the World (2004), at http://www.law.harvard.edu/programs/annual_review/

[3] Center for Reproductive Rights, Abortion and the Law: Ten Years of Reform (Feb. 2005), at http://www.reproductiverights.org/pdf/pub_bp_abortionlaws10.pdf

Comparison by Numbers

Category	Sub-category 1	Sub-category 2	No.	Percent**
Total Countries Surveyed			193	100%
Restrictive Countries			131	68%
Permissive Countries			62	32%
	With involvement laws		25	13%
		and no bypasses or emergency exceptions	10	5%
		and bypasses	7	4%
		and emergency exceptions	11	6%
		and both bypasses and emergency exceptions	3	2%
	With comparable restrictions		22	11%
	With no safeguards for minors		15	8%

** Percents are calculated to the nearest whole number.

App. 2

APPENDIX B

COMPARABLE RESTRICTIONS IN PERMISSIVE COUNTRIES*

	Country	Restrictions†	Sources®
1	Albania	Abortion for life or health reasons requires the approval of three physicians	1, 2
2	Armenia	Any abortion after 1st trimester must be authorized by a commission of local physicians	1
3	Australia	Requirements vary by jurisdiction	1, 2
4	Austria	Abortion after 1st trimester only permitted to avert a serious risk to life or health	2
5	Azerbaijan	Any abortion after the 1st trimester must be authorized by commission of local physicians	1
6	Bahrain	A physician must consult with a panel of physicians before performing an abortion	1, 2
7	Belgium	Abortion after 1st trimester only allowed if two physicians agree there is a grave danger to mother's life or health. Also, requires a one week waiting period with no explicit health or death exception and no bypass.	2
8	Belize	Abortion for health reasons must be authorized by two registered physicians	2
9	Bulgaria	Abortion after 1st trimester only permitted if medical commission determines woman's life is in danger	1, 2
10	Cambodia	Abortion after the 1st trimester is prohibited unless approved by a medical commission	1
11	Cape Verde	Abortion after 1st trimester only permitted to avert a serious risk to life or health	1
12	Finland	Any abortion for health reasons must be independently certified by two physicians	2
13	France	Abortion after 10th week only permitted where grave danger to woman's health is certified by two physicians	2
14	Kyrgyzstan	Abortion after 1st trimester must be authorized by commission of local physicians	1
15	Netherlands	Six day waiting period only waived where life is in danger	2
16	South Africa	Abortion requires approval of three independent physicians. No health exception after 20th week.	2
17	St.Vincent-Grenadines	Abortion must be approved by two medical practitioners	1
18	Switzerland	Abortion requires written approval of second physician except in emergencies.	1
19	Tajikistan	Abortion must be approved by two medical practitioners	1
20	Tunisia	Abortion after 1st trimester only permitted where two physicians agree there is danger to the mother's health	1
21	United Kingdom	The minor must be mature enough to understand all the issues involved and be unwilling to inform her parents	4
22	Zambia	All abortions require consent of three physicians. Exception only for danger of grave permanent injury.	2

* For purposes of this brief, a permissive country is a country that permits abortion on socioeconomic grounds or on demand at some point during pregnancy.

† This column is not a comprehensive list of each country's restrictions on abortions. It only lists restrictions that are comparable to parental involvement laws in the burden they place on all women, including minors, who wish to have an abortion.

∞ Four sources provided the information used to create this table. They are listed below. The sources consulted for each country are indicated by listing the corresponding footnote number in the "Sources" column.

[1] United Nations, Abortion Policies: A Global Review (2002), at http://www.un.org/esa/population/publications/abortion/profiles.htm

[2] Harvard Law School, Abortion Laws of the World (2004), at http://www.law.harvard.edu/programs/annual_review/

[3] Center for Reproductive Rights, Abortion and the Law: Ten Years of Reform (Feb. 2005), at http://www.reproductiverights.org/pdf/pub_bp_abortionlaws10.pdf

[4] See the House of Lords ruling in Gillick v. West Norfolk & Wisbech Area Health Authority, [1985] 3 W.L.R. 830, 1985 WL 311014 (H.L. 1985).

APPENDIX C

STATUTORY LANGUAGE OF EMERGENCY EXCEPTIONS

Country	Language	Source
Barbados	The abortion must be "immediately necessary to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health." Medical Termination of Pregnancy Act (Act No. 4 of 1983), § 8(4).	2
Bosnia Herzegovina	A medical commission may consent to an abortion when it is medically established that it would otherwise be impossible to save the woman's life or prevent damage to her health.	1
Croatia	"[T]he abortion will be performed or completed . . . where immediate danger is present to the life or health of the pregnant woman." Law No. 1252-1978, Act Concerning the Medical Measures for Materialization of the Right to Freely Decide on the Birth of Children (Apr. 21, 1978), art. 25.	2
Cuba	The language of the Cuba health regulations pertaining to abortion is not available.	
Czech Republic	"[T]he consent of the legal representative is also necessary if an abortion on health grounds is performed on [a minor]." Notification of the Ministry of Health of the Czech Socialist Republic on the implementation of Law No. 66/1986 on abortion (Nov. 7, 1986), § 5.	2
Guinea-Bissau	In special circumstances, it is possible for the pregnant woman to receive an abortion without the necessary consent.	1
Iceland	The minor's "parents or a guardian shall participate in an [abortion] application with her unless special reasons oppose it. Law No. 25 of 1975 (May 27, 1975), ch. II, art. 13, § 3.	2
Italy	"Where the physician finds that termination is urgently required in view of a serious threat to the health of a woman under 18 years of age, he shall make out a certificate indicating the conditions justifying the termination of pregnancy, without requesting the consent of the persons exercising parental authority or the guardian and without applying to the magistrate." Law No. 194 on the social protection of motherhood and the voluntary termination of pregnancy (May 22, 1978), § 12.	2
Norway	For minors, "the person exercising parental authority or the guardian shall be given an opportunity to express his views, unless there are particular reasons to the contrary." Law No. 50 on the termination of pregnancy (June 13, 1975), as amended through Law No. 86 (June 16, 1989), § 4.	2
Slovakia	The parental consent requirement is waived "if [the minor's] life or health or the healthy development of the fetus are endangered . . . ." Law on abortion (Oct. 23, 1986), as amended through Law No. 419/1991, § 5.	2
Turkey	The parental consent requirement "may be waived if there could be danger to life or to a vital organ unless urgent action is taken." Law No. 2827 (May 24, 1983), Population Planning Law, § 6.	2

1 United Nations, Abortion Policies: A Global Review (2002), at http://www.un.org/esa/population/publications/abortion/profiles.htm
2 Harvard Law School, Abortion Laws of the World (2004), at http://www.law.harvard.edu/programs/annual_review/

(13)

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IN THE

Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* JAMES P. WEIERS, SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, KEN BENNETT, PRESIDENT OF THE ARIZONA SENATE, REPRESENTATIVE MARK ANDERSON, REPRESENTATIVE LAURA KNAPEREK, SENATOR LINDA GRAY, AND THE CENTER FOR ARIZONA POLICY IN SUPPORT OF PETITIONER

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450 U.S. 398 (1981)..... 5

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Planned Parenthood of the Rocky Mountains Serv. v. Owens, 287 F.3d 910 (10th Cir. 2002)..... 14

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Planned Parenthood of S. Arizona v. Neely,
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Planned Parenthood of S.E. Penn. v. Casey,
505 U.S. 833 (1992).....*passim*

Planned Parenthood of S.E. Penn. v. Casey,
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Troxel v. Granville, 530 U.S. 57 (2000) 6

United States v. Salerno,
481 U.S. 739 (1987) 8, 9

Webster v. Reprod. Health Serv.,
492 U.S. 490 (1989) 9

Statutes

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N.H. Rev. Stat. Ann. § 132:26 (2005) 12

Other Authorities

Black's Law Dictionary (8th ed. 2004) 8

Fox News / Opinion Dynamics Poll,
(April 27, 2005) *at*
http://www.foxnews.com/projects/pdf/poll_042705.pdf
..... 4

Guttmacher Institute, *State Policies in Brief: Parental Involvement in Minors' Abortions*, (July, 2005) *at*
http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf 4

Note, *Arizona Court of Appeals Holds That a Minor Must Show Fitness by Clear and Convincing Evidence To Bypass the State's Parental Consent Requirement*, 117 Harv. L. Rev. 2785 (2004) 6

Robbie Sherwood, *Parental Consent For Minors To Get Abortion Takes Effect*, Ariz. Republic, March 5, 2003, at B1. 11

Teresa Stanton Collett, *Protecting Our Daughters: The Need For The Vermont Parental Notification Law*, 26 Vt. L. Rev. 101 (2001) 5, 6

INTEREST OF *AMICI CURIAE*[1]

James P. Weiers is the Speaker of the Arizona House of Representatives. Ken Bennett is the President of the Arizona Senate. Representative Mark Anderson, Representative Laura Knaperek, and Senator Linda Gray are members of the Arizona Legislature. In 2000, *amici* legislators were the sponsors of SB 1238, Arizona's parental consent law (codified as Ariz. Rev. Stat. § 36-2152 (2005)).

The Center for Arizona Policy ("Center") is a non-profit tax-exempt research, education, and advocacy organization. The Center promotes public policy that strengthens Arizona's families. In 1996, the Center's General Counsel helped draft and testified in support of a prior version of Arizona's parental consent law. After that law was eventually enjoined, the Center supported a revised parental consent bill in 2000 with further legislative testimony and by circulating and delivering petitions with over 12,000 signatures in support of the bill to the Arizona legislature.

Amici recognize the importance of this case and urge this Court to reverse the ruling of the United States Court of Appeals for the First Circuit. *Amici*

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. None of the counsel for the parties authored this brief in whole or in part. Counsel for *amici* have applied to the Alliance Defense Fund ("ADF") for a grant for the preparation of this brief. ADF is a non-profit, 501(c)(3) organization that funds legal work in the public interest. Counsel for *amici* certify that they are the exclusive authors of this brief.

write to highlight their concern with the impact this case will have on the ability of state policymakers to promote the interests of pregnant minors and their parents through parental involvement laws.

SUMMARY OF THE ARGUMENT

New Hampshire's parental notification law is a modest and appropriate response to the critical issue of underage pregnancy. State governments enact parental notification and consent laws (hereinafter collectively referred to as "parental involvement laws") to promote the rights, well-being, and safety of young women, the rights of parents, as well as to promote their own valid governmental interests. Parents occupy a unique and essential place in the lives of their children. Pregnant minors can benefit tremendously from the involvement and support of their parents. The state helps young women when it encourages their parents to stand with them in their time of need. This Court recognizes that parents have a fundamental interest in the freedom to control the care and upbringing of their children, as well as in the ability of parents to develop and enjoy close relationships with their children. It is appropriate for states to use parental involvement laws to recognize and promote the rights of parents and encourage the parent-child bond. Parental involvement laws also serve important state interests. States have a clear interest in ensuring that pregnant minors are protected at all times in the exercise of their rights. States also have a clear interest in promoting live childbirth.

This Court has said that parental involvement laws occupy an important place within the nation's legal framework. Increasingly, however, lower

courts employ an exacting standard to review these laws, often resulting in their invalidation. This Court should continue its practice of using the traditional standard for facial challenges to the constitutionality of parental involvement laws. Because facial challenges allege that laws have no constitutional application, it is appropriate to require that there is no set of circumstances under which the challenged law would be constitutional. The standard that was used by the First Circuit Court of Appeals in this case—and the standards that have been employed by many of the lower courts—essentially require that states enact perfect laws of general applicability. This severely restricts the ability of policymakers to enact meaningful parental involvement legislation.

Finally, New Hampshire's parental notification law does not preclude a pregnant minor from receiving a medically necessary abortion. The decision of the First Circuit erroneously presumes that New Hampshire's judges, who are statutorily tasked with safeguarding the "best interests" of pregnant minors, will unreasonably delay awaited decisions on judicial bypass requests. In actuality, New Hampshire's courts are open to pregnant minors 24 hours a day, 7 days a week. There is no evidence that the New Hampshire judiciary will not make every accommodation for minors seeking a judicial bypass. Further, in striking New Hampsire's parental notification law, the District Court and the First Circuit gave short shrift to *Hodges v. Minnesota*, in which this Court confirmed the constitutionality of a similar parental notification law. The legal framework that this Court shapes is very important to state policy-

makers. By ignoring *Hodges*, the courts below have undermined part of that legal framework. The time is right for the Court to reassert its guidance so that state legislatures can continue to promote parental involvement without being hampered by ambiguity or unreasonable interference.

ARGUMENT

I. PARENTAL INVOLVEMENT LAWS PROMOTE SIGNIFICANT RIGHTS AND INTERESTS

Parental involvement laws are the best way for states to harmonize the rights of minors to have access to abortion, the rights of parents to serve as the primary caregivers and protectors of their children, and the interests of state governments to safeguard the welfare and safety of pregnant minors as well as to promote live childbirth. These rights and interests are compelling. Consequently, parental involvement legislation is overwhelmingly popular across the country.[2]

States further "a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision of whether or not to bear

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[2] One recent poll finds that 78% of Americans support legally required parental notification and 72% support parental consent. *See Fox News/Opinion Dynamics Poll*, (April 27, 2005) *at* http://www.foxnews.com/projects/pdf/poll_042705.pdf. At present 34 states have parental involvement laws. *See generally*, Guttmacher Institute, *State Policies in Brief: Parental Involvement in Minors' Abortions*, (July, 2005) *at* http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

a child." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J. concurring). While the state cannot impose a third party veto on a minor's decision to seek an abortion, *id. at* 74-5, it can and should pass legislation that permits and encourages others to come along side and support minors as they face a very difficult and important decision. As this Court observed in *Ohio v. Akron Center for Reproductive Health* ("*Akron II*"), "[i]t is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature." 497 U.S. 502, 520 (1990).

Clearly most pregnant minors benefit when the law promotes parental involvement. Parents can facilitate full and effective communication between their daughters and abortion providers. *See Akron II*, 497 U.S. at 518-19; *and H.L. v. Matheson*, 450 U.S. 398, 411 (1981). Typically, parents are also in the best position to support and assist their daughters in the days following an abortion. Young women may need someone close to help them deal with the emotional side of the abortion decision. *See Hodgson v. Minnesota*, 497 U.S. 417, 484 (1990) (Kennedy, J., concurring in the judgment). Parents can also help their daughters be alert to any post-abortive health complications. *See generally* Teresa Stanton Collett, *Protecting Our Daughters: The Need For The Vermont Parental Notification Law*, 26 Vt. L. Rev. 101, 113-17 (2001) (noting that teens are less likely to return for post-operative exams and outlining possible post-abortive health complications). Additionally, parental involvement laws serve as a safeguard in detecting whether a minor has been the

victim of sexual assault. *Id.* at 118. Pregnant minors often find themselves in a very vulnerable position. States act in the best interests of pregnant minors when they encourage parental involvement.

Parental involvement laws also safeguard the "fundamental interest" of parents to control the care and upbringing of their children. *See Troxel v. Granville*, 530 U.S. 57, 65-6 (2000). "It is cardinal with us," this Court has explained, "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) ("*Bellotti II*") (citation omitted) (emphasis in original). Moreover, parents "have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children." *Hodgson*, 497 U.S. at 484 (citations omitted) (Kennedy, J. concurring in the judgment). Parental consent laws help ensure that the bond between parents and children stays strong at the time when it is most needed.[3]

[3] To this end, the Arizona Court of Appeals has held that a judicial bypass of parental consent is only appropriate upon a showing by "clear and convincing evidence." The court reasoned, in part, that such an evidentiary standard is warranted because judicial bypass "impacts a parent's opportunity to participate in making a significant decision involving his or her minor daughter." *In re B.S.*, 74 P.3d 285, 290 (Ariz. App. Ct. 2003) (citing *Akron II*, 497 U.S. at 517-18); *see also* Note, *Arizona Court of Appeals Holds That a Minor Must Show Fitness by Clear and Convincing Evidence To Bypass the State's Parental Consent Requirement*, 117 Harv. L. Rev. 2785 (2004) (summarizing *In re B.S.* and Arizona's use of the "clear and convincing" standard for judicial bypasses).

footnote continued

Finally, the State itself has several interests that are served by promoting parental involvement. The State shares a pregnant minor's interest in seeing that her health is protected at all times. The State shares parents' interest in ensuring that their daughters are protected from sexual predators. States also have an undeniable interest in promoting live childbirth. *See Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 886 (1992) ("[A] state is permitted to enact persuasive measures which favor childbirth over abortion. . . .") *accord Simat v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 33 (Ariz. 2002) (recognizing that the state has a "compelling interest . . . in preserving and protecting potential life and promoting childbirth."). The welfare of pregnant minors, their legal rights, the legal rights of parents, and the interests of state governments can be harmonized. This is the balance that states such as New Hampshire seek to strike by enacting parental involvement legislation. Unfortunately, New Hampshire's salutary and modest attempt to enact parental notification has been met in the courts below with a rigid and unforgiving review. *Compare Casey*, 505 U.S. at 872 ("A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exerciser of its powers").

II. THIS COURT SHOULD CONTINUE TO ANALYZE FACIAL ATTACKS ON PARENTAL INVOLVEMENT LAWS WITH THE

TRADITIONAL FACIAL CHALLENGE STANDARD OF REVIEW

Generally, facial challenges to laws must fail unless they "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). This rule is firmly grounded in the role of the courts and the role of legislatures in our constitutional system. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Below, the District Court and the First Circuit determined that that this Court has abrogated *Salerno*'s "no set of circumstances" standard in abortion cases and decided this case using the "undue burden" standard from *Casey*. *See Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 57-8 (1st Cir. 2004); *Planned Parenthood of N. New England v. Heed*, 296 F. Supp. 2d 59, 63 (D. N.H. 2003). This was error because this Court has not abandoned the *Salerno* standard in the abortion context. Further, the "no set of circumstances" standard is the appropriate framework for parental involvement cases because it complements the important individual rights and interests that surround underage pregnancy and society's proper response.

Laws are typically challenged, "as applied," meaning "on the facts of a particular case or in its application to a particular party." Blacks Law Dictionary (8th Ed. 2004). Successful "as applied" challenges result in specific applications of laws being enjoined. Conversely, to subject a law to a "facial challenge" is to say, "it always operates unconstitutionally." *Id.* Absent a limiting construction, laws challenged successfully on their face must be struck down, which is "manifestly, strong medicine."

Broadrick, 413 U.S. at 613. As this Court explained in *Salerno*, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745 (emphasis added).

Because facial challenges to parental involvement laws allege that they "always operate[] unconstitutionally," this Court has applied the "no set of circumstances" standard to test allegations that they are unconstitutional. *See Akron II*, 497 U.S. at 514 (citing *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1989) (O'Connor, J. concurring)). By contrast, in this case the First Circuit ruled that *Salerno* no longer applies to laws regulating abortion.[4] Often a statute's very constitutionality depends on whether the reviewing court applies the *Salerno* standard.[5]

This Court's landmark decision in *Planned Parenthood v. Casey* did not abandon the *Salerno* standard. This Court rejected the argument that Penn-

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[4] This has been the approach of the majority of circuits. *See Planned Parenthood of N. New Eng. v. Heed*, 390 F.3d 53, 57-8 (1st Cir. 2004) (surveying the positions of the circuits); *and Richmond Medical Center for Women v. Hicks*, 409 F.3d 619, 626-27 (4th Cir. 2005) (concluding that the *Salerno* standard does not apply to abortion regulation laws); *but see Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992) (applying *Salerno*).

[5] *See, e.g., Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1179-80 (1996) (Scalia, J. dissenting from denial of *certiorari*) (noting that facial challenge to parental notification law would have failed if the appellate court had applied *Salerno*).

sylvania's definition of "medical emergency" foreclosed "the possibility of an immediate abortion despite some significant health risks." *Casey*, 505 U.S. at 880. The statute's language could have been "interpreted in an unconstitutional manner," but this Court preferred the interpretation of the appellate court. *Id.* For its part, the Third Circuit—acting without the benefit of state case law interpreting the provision—construed the statute as constitutional, noting that its interpretation was consistent with this Court's admonition that in the context of a facial challenge "a court is not to strike down a law as unconstitutional on the basis of 'a worst-case analysis that may never occur.'" *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682,700-01 (3d Cir. 1991) (quoting *Akron II*, 497 U.S. at 514).

The "medical emergency" portion of the *Casey* decision has proven extremely influential. As the Ninth Circuit has recently observed, "[e]ssentially this same definition [for "medical emergency"] is used in the statutes of 26 states." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 926 (9th Cir. 2004); *and see id.* n.15 (listing the statutes). If indeed *Salerno* no longer applies to abortion laws, the law has been changed significantly—with widespread consequences. *Salerno's* abrogation could mean, for example, that the Third Circuit's definition of "medical emergency," language that is now widely considered the paragon of constitutionality, may in fact be constitutionally infirm.

As Justice Kennedy recognized in *Hodgson*, "laws of general application . . . cannot produce perfect results in every situation to which [they] appl[y];

but the State is under no obligation to enact perfect laws." *Hodgson*, 497 U.S. at 496-97 (Kennedy, J. concurring in the judgment). *Salerno*'s continued validity in the parental involvement law context continues the tradition of granting deference to state policymakers by avoiding the onerous requirement that they "enact perfect laws."[6] Parental involvement laws involve "extremely sensitive issues." *Id.* State policymakers should be empowered to address these delicate issues. This Court's legal framework should reflect the fact that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Id. at* 491 (quoting *Missouri, K. & T. Ry. Co. of Texas v. May*, 194 U.S. 267, 270 (1904)).

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[6] Arizona's experience demonstrates the ease with which parental involvement laws can be blocked by litigation. Arizona first passed a parental consent in 1989. A federal district judge enjoined the law before it could go into effect. Over the next 13 years Arizona made several attempts to enact a parental consent law, all of which were enjoined. *See Planned Parenthood of Southern Arizona v. Neely*, 130 F.3d 400, 401-2 (9th Cir. 1997) (summarizing these attempts and the litigation up to that time). Parental consent in Arizona finally went into effect in 2003. *See generally Planned Parenthood of Southern Arizona v. Lawall*, 307 F.3d 783 (9th Cir. 2002) (parental consent law given final approval); *and* Robbie Sherwood, *Parental Consent For Minors To Get Abortion Takes Effect*, Ariz. Republic, March 5, 2003, at B1.

III. NEW HAMPSHIRE'S PARENTAL NOTIFICATION LAW ADEQUATELY SAFEGUARDS THE HEALTH OF PREGNANT MINORS

The First Circuit ruled that parental notification was unconstitutional, saying it lacked an exception to preserve the health of the mother. *Heed*, 390 F.3d at 62. The First Circuit erred because there is no requirement that states couch protections for the health of the mother in terms of an "explicit" health exception and because New Hampshire's parental notification law does not "interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880.

The First Circuit rejected New Hampshire's argument that its judicial bypass mechanism is sufficient to satisfy the health exception requirement, reasoning that "delay of up to 14 days could occur. . . ." 390 F.3d 53, 62. But New Hampshire's judicial bypass provision fully protects the health of pregnant minors. The Act requires a judge to authorize a minor's abortion when "the pregnant minor's best interests would be served thereby." N.H. Rev. Stat. Ann. § 132:26(II) (2005). It mandates that bypass proceedings "shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor." § 132:26(II)(b). Finally, the act requires that all courts are accessible to pregnant minors "24 hours a day, 7 days a week." § 132:26(II)(c).

The First Circuit used a worst-case scenario analysis to focus on the maximum number of days a

judicial bypass determination could take—14. This approach ignores the law's flexibility and the fact that it requires judges to make their determination based on what is in the "best interests" of a pregnant minor. The Act does not impose a specific waiting period for a judicial determination, but it does limit the length of time judges can take to make a decision. Nothing in the act prevents New Hampshire trial or appellate judges from acting faster than the 7 days allotted to them by statute. Indeed, in the cases where a pregnant minor's health is at risk, there is no reason to believe that a judge would hesitate to render an immediate decision.

As this Court stated in *Casey*, "we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." 505 U.S. at 899 (emphasis added). The First Circuit, reviewing simple parental notification, has not taken this reaffirmation to heart. In *Hodgson v. Minnesota*, this Court approved of a parental notification law very similar to the one at issue in this case. 497 U.S. 417, 497 (1990) (upholding two-parent notification with a judicial bypass). The First Circuit attempted to distinguish *Hodgson* by saying that a specific challenge for lack of a health exception was not before this Court. *See Heed*, 390 F.3d at 60 & n.6. The suggestion that *Hodgson* has been supplanted is erroneous. Far from abrogating *Hodgson*, the *Casey* decision relies on its reasoning.[7]

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[7] *See Casey*, 505 U.S. at 874 (citing *Hodgson* for the proposition that "Only where state regulation imposes an un-

footnote continued

This Court also cited *Hodgson* in its most recent decision dealing with a parental involvement statute. *See Lambert v. Wicklund*, 520 U.S. 292, 298 n.4 (1997) (upholding Montana's parental notification statute).

The First Circuit's conjecture that *Hodgson* has become a dead letter should be rejected. Other courts have also deemed *Hodgson* to have been displaced *sub silentio*. *See* 390 F.3d at 61 (citing *Planned Parenthood of the Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002); *and Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004)). These decisions are not based on what this Court has actually said. State legislatures depend on this Court's guidance as they fulfill their essential lawmaking function. *See Casey*, 505 U.S. at 845 (recognizing that "legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution."). Indeed, in this case, the New Hampshire legislature has clearly attempted "to fit its legislation into the framework that [this Court] has supplied in [] previous cases." *Hodgson*, 497 U.S. at 497 (Kennedy, J. concurring in the judgment). Lower courts seriously impair the ability of state legislatures to divine and abide by constitutional

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due burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."); *and id.* at 899 (citing *Hodgson* for the proposition that "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.").

tional boundaries when they rule based upon supposed unstated implications drawn from this Court's decisions.

CONCLUSION

The approach of the courts below unreasonably limits the ability of state policymakers to promote parental involvement with pregnant minors. Absent correction from this Court, the lower courts will continue to apply a rigid and unyielding framework to state parental involvement laws. The decision of the First Circuit should be reversed.

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Supreme Court, U.S.
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No. 04-1144

In The Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND, CONCORD FEMINIST
HEALTH CENTER, FEMINIST HEALTH CENTER
OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

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NOTICE

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Planned Parenthood et al. v. Peter Heed, 296 F.Supp.2d 59 (DiClerico, J., 2003) ..... App. 24

United States District Court
District of New Hampshire
Case No. C-03-491-JD

November 17, 2003	Complaint
November 17, 2003	Motion by plaintiffs Concord Feminist Health Center, Feminist Health Center of Portsmouth, Wayne Goldner, Planned Parenthood of Northern New England for Preliminary Injunction with memorandum, declarations and attachments
November 19, 2003	Notice by Concord Feminist Health Center, Feminist Health Center of Portsmouth, Wayne Goldner, Planned Parenthood of Northern New England of Response to Court's Inquiry Concerning Consolidation of Proceedings on Preliminary and Permanent Injunction
December 3, 2003	Objection to Motion for Preliminary Injunction filed by Attorney General of New Hampshire
December 9, 2003	Order by Judge Joseph A. DiClerico, Jr. stating that Plaintiff's request for declaratory and permanent injunctive relief will be consolidated with their request for preliminary relief
December 10, 2003	Reply to Objection to Motion for Preliminary Injunction filed by Feminist Health Center of Portsmouth, Wayne Goldner, and Planned Parenthood of Northern New England

December 29, 2003	Order by Judge Joseph A. DiClerico, Jr. granting plaintiff's Motion for Preliminary Injunction (subsumed into plaintiff's request for permanent injunction)
December 29, 2003	Judgment for Plaintiffs entered by Clerk James R. Starr
January 26, 2004	Defendant's Notice of Appeal to the United States Court of Appeals for the First Circuit

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United States Court of Appeals for the First Circuit Docket No. 04-1161

January 30, 2004	Civil Case Docketed
April 8, 2004	Brief filed by appellant Peter Heed
May 11, 2004	Brief filed by appellees Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.
November 24, 2004	Opinion filed affirming decision of the District Court
November 24, 2004	Judgment entered
December 16, 2004	Mandate issued

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and WAYNE GOLDNER, M.D.,	)	CIVIL ACTION NO:
Plaintiffs,	)	
v.	)	
PETER HEED, Attorney General of New Hampshire, in his official capacity,	)	
Defendant.	)	

COMPLAINT

PRELIMINARY STATEMENT

1. This action seeks injunctive and declaratory relief, pursuant to 42 U.S.C. § 1983, against enforcement of the new New Hampshire law that prevents a minor from obtaining an abortion unless a parent has been notified at least forty-eight hours in advance of the abortion. 2003 N.H. Laws ch.173, to be codified at RSA 132:24-:28 (the Act). A copy of the Act is attached to the Complaint as Exhibit A. The Act is scheduled to take effect December 31, 2003.

2. Contrary to thirty years of Supreme Court precedent, the Act contains no exception to its notice and delay requirements for circumstances in which delay will threaten the health of the young woman. Without such an exception, doctors will be forced to delay abortions for

critically ill minors, putting them at risk for serious medical problems including infertility, loss of vision, and impaired liver and kidney function. For this reason alone, the Act is unconstitutional.

3. In violation of constitutional commands, the Act also endangers young women by preventing physicians from performing even emergency life-saving abortions unless the physician can certify that the minor will die within the time it takes to comply with the Act's notice requirements, and the abortion is the only procedure that will prevent death. Because physicians are not always able in life-threatening situations to make such a certification, the Act threatens the well-being of minors even in these circumstances. Moreover, the Act violates the due process rights of abortion providers and chills the provision of emergency abortions by failing to make clear that physicians may rely on their good faith medical judgment in determining which abortions are necessary to prevent imminent death.

4. The Act also endangers and violates the rights of those minors who cannot safely notify a parent of their pregnancy and need for an abortion. The Constitution guarantees these young women the right to seek a confidential judicial waiver of the Act's notice requirements. But the Act fails to include specific provisions that are necessary to ensure the confidentiality of young women who need such a waiver. For example, the Act has no provision requiring that the court records be sealed or the hearing be closed. Without such provisions to protect their confidentiality, minors will face the very harms of parental notification that they sought to avoid by seeking a waiver.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

6. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because defendant and plaintiffs are located in the District of New Hampshire.

PARTIES

Plaintiffs

8. Planned Parenthood of Northern New England (PPNNE) is a Vermont not-for-profit charitable organization registered to do business in New Hampshire with headquarters in Williston, Vermont. PPNNE operates health centers in New Hampshire, Maine and Vermont, with eight centers in New Hampshire. PPNNE offers its patients a full range of reproductive health services, including family planning counseling and medical services; testing and treatment of sexually transmitted infections; HIV/AIDS testing and counseling; breast and cervical cancer screening; pregnancy testing and options counseling; education and community outreach; abortions; and prenatal care. In New Hampshire, PPNNE offers abortions at its West Lebanon center. Among PPNNE's patients are unemancipated women under the age of eighteen who need abortions. PPNNE sues on its own behalf and on behalf of its minor patients.

9. Concord Feminist Health Center (CFHC) is a New Hampshire-based not-for-profit charitable organization that operates a reproductive health care center in Concord.

CFHC provides a full range of reproductive health care services, including family planning counseling and medical services; testing and treatment of sexually transmitted infections; HIV/AIDS testing and counseling; prevention and screening for breast and gynecological cancer; health education and community outreach; pregnancy testing and options counseling; and abortions. Among CFHC patients are unemancipated women under the age of eighteen who need abortions. CFHC sues on its own behalf and on behalf of its minor patients.

10. Feminist Health Center of Portsmouth (FHCP) is a New Hampshire-based not-for-profit charitable organization that operates a reproductive health care center in Greenland. FHCP offers full well-woman gynecological care, including family planning counseling and medical services; testing and treatment for sexually transmitted infections; counseling and anonymous testing for HIV/AIDS for women and men; prevention and screening for breast and gynecological cancers; health education and community outreach; pregnancy testing and options counseling; and abortions. F-HCP's patients include unemancipated women under the age of eighteen who need abortions. FHCP sues on its own behalf and on behalf of its minor patients.

11. Dr. Wayne Goldner is an obstetrician and gynecologist in private practice in Manchester. Dr. Goldner provides a full range of services, including pregnancy testing and options counseling; prenatal care; delivery of newborns; prevention and screening of gynecological and breast cancers; evaluation and treatment for infertility; care for symptoms of menopause; screening and treatment for sexually transmitted infections; counseling and testing for HIV/AIDS; and abortions. Among his patients are

unemancipated women under the age of eighteen who need abortions. Dr. Goldner sues on his own behalf and on behalf of his minor patients.

Defendant

12. Peter Heed is the Attorney General of New Hampshire. He is charged by law with supervision of all county attorneys and other prosecutors and enforcement of the criminal laws of New Hampshire, including the Act. Attorney General Heed is sued in his official capacity, as are his agents and successors in office.

STATUTORY FRAMEWORK

13. The Act defines "abortion" as the "use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage." RSA 132:24, I.[1]

14. The Act prohibits performance of an abortion upon an unemancipated minor unless the physician or his or her agent provides at least forty-eight hours advance notice of the abortion to one of the minor's parents. *Id.* 132:25, I. The forty-eight hour notice period begins to run from the time of delivery of the notice. Notice may be

[1] For clarity, citations are to sections of the Revised Statutes Annotated where the Act will be codified, rather than to the session law.

delivered in person to the parent's residence or by certified mail. If sent by certified mail, the notice is deemed delivered at noon on the next day on which regular mail delivery takes place subsequent to mailing. *Id.* 132:25, II & III. These requirements may be dispensed with if the parent certifies in writing that he or she has been notified. *Id.* 132:26, I(b).

15. In lieu of parental notification, a minor may petition a court of competent jurisdiction for a waiver of the notice requirement. The court must grant the waiver if it finds that the minor is mature and capable of giving informed consent to the abortion or the performance of an abortion without parental notification is in the minor's best interests. *Id.* 132:26, II.

16. The Act states that the judicial waiver process "shall be confidential," but no specific procedures are set forth in the statute to effectuate this right of confidentiality. For example, no provision is made for sealing of the record or closing of hearings or appellate arguments. *Id.* 132:26, II(b).

17. The Act states that the court must rule on the minor's petition within seven calendar days from the time the petition is filed. *Id.* 132:26, II(b). A minor has a right to appeal an adverse decision and the appellate court must rule on her petition within seven calendar days of the docketing of the appeal. *Id.* 132:26, II(c).

18. The sole exception to notification or judicial waiver is when the attending physician "certifies" in the pregnant minor's medical record that the abortion "is necessary to prevent the minor's death and there is insufficient time to provide the required notice." *Id.*

132:26, I(a). There is no exception for medical emergencies that will not result in imminent death.

19. Violation of the Act is a misdemeanor and grounds for a civil action by a person wrongfully denied notification. A provider may avoid criminal or civil liability by "establish[ing] by written evidence" that he or she "relied on evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with the section are bona fide and true." *Id.* 132:27.

FACTUAL ALLEGATIONS

20. Abortion is among the safest surgical procedures that doctors perform. Both in terms of mortality (death) and morbidity (serious complications), abortion is safer than carrying a pregnancy to term. Although abortion remains safe throughout pregnancy, the risks associated with the procedure increase as the pregnancy progresses.

21. Most minors involve a parent in their decision to have an abortion. The younger the minor is, the more likely she is to do so. Most minors who do not involve a parent involve a trusted adult such as a relative or school nurse.

22. Confidentiality is of the greatest concern to all women seeking abortion services, but particularly to minors. Among the urgent reasons a minor may fear revealing her pregnancy and planned abortion to a parent are fear of parental retaliation, including physical abuse, being made to leave home, and being forced to carry a pregnancy to term against her will.

23. The judicial bypass provided by the Act fails to provide the confidentiality minors need because it fails to

set forth specific procedures to safeguard the minor's identity. For example, it fails to explicitly require the sealing of records or the conducting of hearings in a closed chamber. Without these protections, minors will be deterred from seeking judicial waivers they need. Moreover, the Act's failure to protect minors' confidentiality could lead to parental notification and the very harms minors seek to avoid by using the judicial bypass.

24. The Act fails to allow a physician to provide a prompt abortion to a minor whose health would be endangered by the delay necessary to comply with the Act.

25. There are a number of urgent medical situations that require a prompt abortion to be provided to protect the health of the woman. Among these situations are premature rupture of the membranes that enclose the pregnancy; preeclampsia; and significant bleeding from the uterus in early pregnancy. Often, in these situations, delaying the procedure in order to comply with the parental notification requirements of the statute or for the minor to obtain a court waiver, would pose dangers to the minor's health, including the danger of infertility, vision loss, chronic pain, or kidney or liver damage. Yet, the physician will not always be able to certify that performing the procedure without the delay required by the Act would be necessary to prevent the minor's death.

26. By failing to allow immediate abortions in circumstances where the minor's health, but not her life, is threatened by the delay necessary to comply with the Act, the Act endangers the health of minors.

27. The Act's requirement that even to protect a minor's life the physician "certif[y]" that "the abortion is necessary to prevent the minor's death and there is

insufficient time to provide the required notice," endangers even those minors in need of life-saving abortions. Because a physician cannot accurately predict when a minor's condition has progressed to the point where she will die within the time it takes to comply with the Act's requirements, physicians will not be able to rely on this exception.

28. The requirement that the abortion be the only procedure that will prevent death during the period necessary to comply with the Act will require physicians to use procedures to stave off death that could cause long term impairment of the minor's health.

29. The Act's exception for abortions necessary to prevent a minor's imminent death does not make it clear that a physician may exercise his or her best medical judgment in making the certification required by the Act. The prospect of prosecutors, judges and juries disagreeing with physicians' judgment and convicting them for acting on their good faith medical judgment will chill the provision of emergency abortion services.

30. The Act states that a provider may avoid criminal or civil liability by "establish[ing] by written evidence" that he or she "relied on evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with the section are bona fide and true." RSA 132:27. This provision places an unduly high burden of proof on providers seeking to defend themselves against civil or criminal liability. RSA 132:27 further conflicts with standards of culpability set out in RSA 626:2. This conflict renders the Act void for vagueness.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

31. The Act deprives plaintiffs' patients of their right to privacy as protected by the Fourteenth Amendment to the United States Constitution by (a) failing to allow prompt abortions necessary to protect the woman's health; (b) failing to provide an adequate emergency exception to protect their lives; (c) failing to provide a confidential judicial waiver procedure; (d) chilling the provision of abortions services by failing to give clear notice of what conduct is prohibited by the Act's terms and placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability.

SECOND CAUSE OF ACTION

32. The Act deprives plaintiffs of due process of law as protected by the Fourteenth Amendment to the United States Constitution by (a) subjecting plaintiffs to criminal prosecution and civil liability for providing abortions to prevent the minor's death without clearly providing that they may rely on their good faith medical judgment in certifying that such abortions are necessary to prevent the minor's imminent death; (b) containing vague and/or conflicting terms that fail to give plaintiffs adequate notice of what conduct the law prohibits; and (c) placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability.

WHEREFORE, Plaintiffs request that the Court:

1. Issue a declaratory judgment that the Act violates the rights of plaintiffs and their patients as protected by

the Fourteenth Amendment to the United States Constitution and is therefore void and of no effect;

2. Issue preliminary and permanent relief, without bond, restraining enforcement, operation and execution of the Act by enjoining defendant, his agents employees, appointees or successors from enforcing, threatening to enforce or otherwise applying the provisions of the Act;

3. Grant plaintiffs attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988; and

4. Grant such further relief as this Court deems just and proper.

Respectfully submitted,

Dated: November 17, 2003 /s/ Martin P. Honigberg

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EXHIBIT A

CHAPTER 173
HB 763-FN – FINAL VERSION

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT requiring parental notification before abortions may be performed on unemancipated minors.

Be it Enacted by the Senate and House of Representatives in General Court convened:

173:1 Legislative Purpose and Findings.

I. It is the intent of the legislature in enacting this parental notification provision to further the important and compelling state interests of protecting minors against their own immaturity, fostering the family structure and preserving it as a viable social unit, and protecting the rights of parents to rear children who are members of their household.

II. The legislature finds as fact that:

(a) Immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences.

(b) The medical, emotional, and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature.

(c) The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of abortion are not necessarily related.

(d) Parents ordinarily possess information essential to a physician's exercise of best medical judgment concerning the child.

(e) Parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after the abortion.

III. The legislature further finds that parental consultation is usually desirable and in the best interest of the minor.

173:2 New Subdivision; Parental Notification Prior to Abortion. Amend RSA 132 by inserting after section 23 the following new subdivision:

Parental Notification Prior to Abortion

132:24 Definitions. In this subdivision:

I. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

II. "Commissioner" means the commissioner of the department of health and human services.

III. "Department" means the department of health and human services.

IV. "Emancipated minor" means any minor female who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents.

V. "Guardian" means the guardian or conservator appointed under RSA 464-A, for pregnant females.

VI. "Minor" means any person under the age of 18 years.

VII. "Parent" means one parent of the pregnant girl if one is living or the guardian or conservator if the pregnant girl has one.

132:25 Notification Required.

I. No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

II. The written notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

III. In lieu of the delivery required by paragraph II, notice shall be made by certified mail addressed to the

parent at the usual place of abode of the parent with return receipt requested and with restricted delivery to the addressee, which means the postal employee shall only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

132:26 Waiver of Notice.

I. No notice shall be required under RSA 132:25 if:

(a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice; or

(b) The person or persons who are entitled to notice certify in writing that they have been notified.

II. If such a pregnant minor elects not to allow the notification of her parent or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests and shall authorize an abortion provider to perform the abortion without such notification if said

judge concludes that the pregnant minor's best interests would be served thereby.

(a) Such a pregnant minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.

(b) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor. In no case shall the court fail to rule within 7 calendar days from the time the petition is filed. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(c) An expedited confidential appeal shall be available to any such pregnant minor for whom the court denies an order authorizing an abortion without notification. The court shall make a ruling within 7 calendar days from the time of the docketing of the appeal. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant minor at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same,

shall be afforded such a pregnant minor 24 hours a day, 7 days a week.

132:27 Penalty. Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bone [sic] fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

132:28 Severability. If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications. and to this end, the provisions of this subdivision are severable.

173:3 Effective Date. This act shall take effect December 31, 2003.

(Approved: June 19, 2003)
(Effective Date: December 31, 2003)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and **WAYNE GOLDNER, M.D.,** Plaintiffs, v. **PETER HEED,** Attorney General of New Hampshire, in his official capacity, Defendant.	CIVIL ACTION NO:

DECLARATION OF WAYNE GOLDNER, M.D.

Wayne Goldner, M.D., declares and states the following:

1. I am an obstetrician and gynecologist in private practice in Manchester. I am board certified by the American Board of Obstetricians and Gynecologists, licensed to practice medicine by the State of New Hampshire, and a fellow in the American College of Obstetricians and Gynecologists. I graduated from the University of Pennsylvania School of Medicine in 1978 and completed a residency in obstetrics and gynecology at Baystate Medical Center in 1982. From 1989-1991, I was the chair of the Department of Obstetrics and Gynecology at Elliot Hospital, where I continue to provide hospital-based care. I am one of the plaintiffs in this action.

2. I have practiced obstetrics and gynecology since 1982. I provide my patients with a full range of services, including pregnancy testing and options counseling; prenatal care; delivery of newborns; prevention and screening of gynecological and breast cancers; evaluation and treatment for infertility; care for symptoms of menopause; screening and treatment for sexually transmitted infections; counseling and testing for HIV/AIDS; and abortions.

3. Abortion is an extremely safe medical procedure. Indeed, it is among the safest surgical procedures that doctors perform. Both in terms of mortality (death) and morbidity (serious complications short of death) abortion is many times safer than continuing pregnancy through to childbirth. Although abortion remains safe throughout pregnancy, the risks associated with the procedure increase as the pregnancy progresses.

4. My patients include both adult women and teenagers. The majority of my teenage patients who seek abortions (approximately 60 to 70 percent) bring a parent with them to the appointment. Most teens who do not bring a parent bring another significant adult, such as a grandmother.

5. I have read the New Hampshire Parental Notification Prior to Abortion Act (the Act). As I understand it, the Act requires that, unless a minor's parent certifies in writing that he or she has been notified of the minor's abortion, I will have to notify the minor's parent, then wait at least forty-eight hours before performing the abortion. If the teenager cannot notify her parent, she may opt instead to go to court seeking authorization for the abortion. While the young woman figures out the court

process, applies for the judicial waiver, and awaits a decision from the court, the abortion may be delayed for a week, two weeks, and possibly longer. If I do not comply with the Act, I risk criminal prosecution and civil lawsuits.

6. As I understand it, the Act contains no exception for circumstances where my patient needs a prompt abortion to protect her health and only a limited exception for circumstances where the abortion is needed to protect her life. I submit this declaration in support of plaintiffs' motion for a preliminary injunction because it is my professional opinion that the Act's failure to include a health exception and a sufficient life exception will put young women at grave risk.

The Lack of a Health Exception Puts My Patients at Risk

7. For teens facing medical emergencies, the Act permits me to perform an immediate abortion only when I can certify that the abortion is "necessary to prevent the minor's death and there is insufficient time to provide the required notice." RSA 132:26,I(a). It does not allow me to proceed immediately if the delay required by the Act threatens my patient's health, but an immediate abortion is not necessary to prevent her death. Thus, unless I can get a written certification from a parent, the Act will force me to subject a teen patient to a delay of at least forty-eight hours *even if* the teen needs an immediate abortion to prevent serious harm to her health. Unfortunately, there are many such conditions. I detail some of them below.

8. For example, a pregnant teenager can develop preeclampsia, a form of pregnancy-induced hypertension

characterized by excessively high blood pressure. Preeclampsia puts a woman at risk for liver and kidney dysfunction or failure; severe bleeding; vision loss; and fluid in the lungs. If not treated, preeclampsia may also progress to eclampsia, which can cause seizures, coma, and even death. Both preeclampsia and eclampsia occur most frequently in young women pregnant for the first time. The only cure for preeclampsia is termination of the pregnancy.

9. A patient who presents with preeclampsia probably will not die within forty-eight hours, and therefore I generally won't be able to certify that an "abortion is necessary to prevent her death and there is insufficient time to provide the required notice." Yet, because delay may well cause substantial harm to the patient's liver, kidneys, or vision, the best medical course will often be to end the pregnancy immediately. But because the Act contains no exception for circumstances where delay will cause serious harm to a patient's health, the Act would force doctors to jeopardize their patients' health by delaying the abortion.

10. A pregnant teen may also experience premature rupture of the membranes, a condition where the membranes that surround a fetus and that contain amniotic fluid rupture prior to fetal viability. Women with premature rupture of membranes are at risk of developing a serious infection of the placental lining, called chorioamnionitis. When a woman with premature rupture of membranes develops this type of infection, she is at serious risk of severe and permanent harm to her health, including scarring of the reproductive organs which can cause total infertility, chronic pelvic pain, and an abdominal abscess. If not treated appropriately, chorioamnionitis

can lead to systemic sepsis (an infection that spreads throughout the body) and even cause death.

11. The course of chorioamnionitis is unpredictable and it can spread quickly. Because every minute the woman remains infected, she is at risk of serious damage to her health, the best medical course is often to provide an immediate abortion. But because a woman in the early stages of the infection probably won't die within forty-eight hours, the Act will force me to delay the procedure. While I wait, my patient is at risk of serious and permanent harm to her health: without a prompt abortion she may lose the ability ever to become pregnant again and may be subject to serious pain for the rest of her life.

12. Other women develop what is known as spontaneous chorioamnionitis, not associated with premature rupture of membranes. This condition may start with a simple urinary tract infection or a sexually transmitted infection, such as chlamydia, which is extremely prevalent among sexually active teenagers. For pregnant women with spontaneous chorioamnionitis, the infection may travel from the pelvic organs throughout the body. To prevent patients from suffering serious, chronic pain, losing their future fertility, or damaging major organ systems, such as their kidneys or liver, the best medical course is to perform a prompt abortion. But the Act prevents me from providing medically appropriate care. Unless I am able to certify that an "abortion is necessary to prevent her death and there is insufficient time to provide the required notice," something I am unlikely to be able to do, I will have to delay the abortion for forty-eight hours or more and expose my patient to the real risk of a lifetime of pain, infertility, and permanent, significant health problems.

13. Pregnant patients may also develop a host of other pelvic infections that may require an immediate abortion. These infections can be triggered by a number of causes, such as an IUD that has remained in place in the uterus, or a sexually transmitted infection. As with chorioamnionitis, delaying an abortion for a pregnant patient with a pelvic infection puts the patient at risk of permanent damage to her health, including infertility and chronic pain. But because in most circumstances I am unlikely to be able to certify that a patient with such an infection will die within forty-eight hours without an abortion, the Act requires that I delay treatment, and put my patient's long-term health at risk.

14. An immediate abortion may also be needed when a woman experiences heavy bleeding from the uterus. This condition may well arise at an early stage of pregnancy. Severe bleeding places the teenager at risk of dangerously low blood pressure, permanent kidney and liver damage, and infertility. Such patients are also often at risk for infection, with all the dangers that entails. If the patient loses a lot of blood, she will require blood transfusions, which carry their own risks.

15. When a patient experiences this significant bleeding the best medical course may be to provide an immediate abortion. Unless the bleeding is quite severe though, she probably will not die within the time it takes to comply with the Act's notice requirements, and therefore I will have to delay providing the abortion for forty-eight hours or more. But if I delay, my patient will be at risk of kidney and liver damage, as well as the complications from infection and blood transfusions that I detailed above.

The Act's Narrow Death Exception Endangers My Patients' Health and Lives

16. I am also concerned that the Act will prevent me from providing appropriate care even when my patient's life is at risk. As I understand it, for minors facing even life-threatening emergencies, the only exception to the parental notice requirements comes when I can "*certif[y]*" that "the abortion is *necessary* to prevent the minor's death and there is *insufficient time to provide the required notice.*" RSA 132:26,I(a) (emphasis added). In many ways, however, this death exception does not reflect medical reality and is insufficient to protect my patients.

17. For women facing certain life-threatening conditions, the best medical course is often to provide an immediate abortion. Yet, as I understand it, the Act allows me to proceed immediately only when I can certify that my patient will die within the time it takes to comply with the Act's notice requirement. But that just is not the way medicine works: Whether and when a patient will die cannot be predicted with such accuracy. Patients do not become progressively sick according to a pattern such that I could say at a certain point in time that they [sic] patient has forty-eight hours to live. The course of these medical conditions is unpredictable: A patient might appear to be close to death but live for days. On the other hand, unfortunately, a sick patient might seem sufficiently stable to live for forty-eight hours or more, but suddenly die. Because I cannot tell in advance how quickly my patients' condition will worsen, I will not be able to certify – as the Act requires – that she would die before I fulfilled the Act's notice requirements. Therefore, the Act will force me to choose between following the law and letting my patient's condition deteriorate, possibly past the point of being able

to save her life at all, and alternatively providing appropriate medical care to my patient and risking criminal prosecution and being sued by her parents. The law should not put patients and their doctors in this untenable position.

18. The Act also ties doctors' hands and threatens patients by preventing physicians from performing life-saving abortions unless they can certify that the abortion is "necessary" to prevent the minor's death. But again, this ignores medical realities and puts my patients at risk. Although an abortion may be the safest and most medically appropriate way to save my patient's life, because there often will be other treatments, such as antibiotics and blood transfusions, that will keep my patient alive for some period of time, I will not be able to certify that the abortion is "necessary" to prevent her death. Under the Act, then, I would be required to provide this other treatment even where it poses far greater risks than an abortion and could result in irreversible adverse health consequences for my patient, such as damage to her kidneys or liver or infertility. The combination of the Act's cramped death exception and the absence of any exception to protect my patients' health forces physicians to act contrary to their patients' best medical interests and thereby jeopardize our patients' health.

19. All of this is made worse, because, as I understand it, the Act also does not entrust to the physician's good faith medical judgment the decision of whether an immediate abortion is necessary to prevent the minor's death within a given time. This makes me very nervous. It goes without saying that abortion is extremely controversial. On top of that, as I have said, medicine is not an exact science. Unless I am allowed to rely on my good faith

medical judgment, I could be convicted if the prosecution convinced a jury that my patient had an extra day to live or that an abortion was not absolutely necessary to save her life. In this way, the Act forces doctors to think about criminal prosecution at a time when we need to be concentrating on doing what is best for our patients, thus creating unnecessary risk to patients' health and lives.

Conclusion

20. In sum, because the Act will prevent me from caring for my patients according to accepted medical practice and my best medical judgment, I fear enforcement of the Act for my patients' sake as well as my own. The Act will cause grave harm because it does not allow for immediate abortions to protect a teenager's health and includes a "death exception" that is inadequate to protect my patients. The Act thus places me in fear of prosecution for fulfilling my duty as a physician, which is to proceed with my patient's safety as my paramount concern.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 11, 2003

/s/ Wayne Goldner, M.D.
Wayne Goldner, M.D.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and **WAYNE GOLDNER, M.D.,** Plaintiffs,	)	CIVIL ACTION NO:
v.	)	
PETER HEED, Attorney General of New Hampshire, in his official capacity, Defendant.	)	

DECLARATION OF RACHEL ATKINS, P.A., M.P.H.

RACHEL ATKINS, P.A., M.P.H., declares subject to the penalties of perjury:

1. I am the Vice President for Medical Services of Planned Parenthood of Northern New England (PPNNE), a plaintiff in this case. I am a physician assistant and hold a masters degree in public health. I submit this declaration in support of plaintiffs' application for a preliminary injunction against the Parental Notification Prior to Abortion Act, which is scheduled to take effect December 31, 2003 (parental notice law). It is my opinion that if the parental notice law is allowed to take effect, some of PPNNE's minor patients will suffer irreparable injury.

2. PPNNE is a Vermont not-for-profit charitable organization registered to do business in New Hampshire.

PPNNE operates 27 health centers in New Hampshire, Maine and Vermont, with 8 of those centers in New Hampshire. PPNNE offers its patients a full range of reproductive health services, including family planning counseling and medical services, testing and treatment of sexually transmitted infections, HIV/AIDS testing and counseling, breast and cervical cancer screening, pregnancy testing and options counseling, abortions and prenatal care. In 2002, PPNNE served 19,028 patients in New Hampshire. PPNNE offers abortions in New Hampshire at its West Lebanon health center.

3. I have had extensive experience in abortion care, both as a provider of abortion services to adult women and teens, and as an administrator, managing the provision of abortion services. I began in 1978 as a health educator and abortion counselor and then trained as a physician assistant in women's health. As a physician assistant, I provided out-patient gynecological services, including first trimester abortions, for 15 years, from 1981 to 1995. During that time, I counseled hundreds of pregnant women, including numerous teenagers, regarding their pregnancies and their decisions to continue their pregnancies or to have an abortion. In addition, since 1987, I have supervised the provision of medical services, including abortion care. From 1987 to 2000, I was Executive Director of the Vermont Women's Health Center, a private non-profit medical practice that provided comprehensive obstetrical and gynecological health care, including abortions. In 2000, I took the position of Assistant Director of Medical Services at PPNNE and, in 2003 was promoted to Vice President for Medical Services. In my present position, I supervise the provision of all medical services including abortion services at PPNNE's medical centers in

Maine, Vermont and New Hampshire. I conduct these activities in cooperation with PPNNE's medical director, a physician.

4. The vast majority of minors who obtain abortions from PPNNE in New Hampshire involve a parent in their decision. The younger the minor is, the more likely she is to come to a health center with a parent. If a minor has not already talked to a parent, PPNNE staff explores with the minor her reasons for not involving a parent and encourages her to do so, unless parental involvement would be against her best interests. Often, after this counseling, minors agree to involve a parent. Of those who do not, nearly all involve a trusted adult, such as a relative or school nurse.

5. I have read the parental notice law and am aware that it does not have specific provisions to maintain the confidentiality of minors who attempt to obtain a judicial bypass. I believe that this lack of protection, especially in a rural state like New Hampshire, will have a deterrent effect on minors' willingness to use the bypass. Without guarantees that the bypass will be confidential, minors who fear notifying a parent, will be deterred from obtaining legal abortion services. Such minors may carry to term in circumstances that are against their best interests, delay the procedure, which can increase the risk of complications or, in some instances, resort to unsafe illegal or self-induced abortion. In addition, I fear that those minors who use the bypass and experience a breach of confidentiality in which their parents learn of their abortion, could experience harm in the form of being forced to carry a pregnancy to term against their will, being forced out of their homes, or being physically or emotionally abused or maltreated.

6. The small number of our patients unwilling to involve a parent in their abortion decisions often have serious reasons for not doing so. These reasons include fear of serious emotional or physical abuse, being thrown out of the home, and being cut off from parental support, including financial support and college tuition. These fears often are based on a parent's past specific threat of untoward consequences if the minor were ever to become pregnant. Minors often have good reason to believe a parent will carry out such threats. For example, parents may have maltreated them in the past in similar stressful situations or an older sibling may already have been thrown out of the home or beaten when a parent learned of a pregnancy. Among our patients have been young women from other countries and cultures who feared ostracism, even death, if an out-of-wedlock pregnancy were revealed to their families.

7. Sometimes the minor's parents are deeply ideologically opposed to abortion, and are even active in the local anti-abortion movement. Such minors fear an emotional rift if such parents find out about their decision or that the parent will try to block them from obtaining the abortion by confining them to the home or monitoring their activities. Recently, a parent active in the local anti-abortion movement repeatedly called our center, posing as her daughter, and attempted to cancel her daughter's appointment for an abortion. On the day of the daughter's appointment, she showed up at the health center, in an attempt to prevent her daughter from obtaining an abortion.

8. Often minors fear disturbing a family already in a stressful situation. A member of the minor's family, such as a grandparent, may recently have died; a minor's

parents may be dealing with a sibling who is in trouble because of criminal activity. One of our patients did not want to burden her mother, a widow who had recently been diagnosed with cancer. A minor may fear that news of her pregnancy and planned abortion will be more than a parent in these circumstances can handle.

9. I believe that minors' drive to maintain their confidentiality would deter many from using the judicial bypass if confidentiality were not assured. The possibility of a breach of confidentiality that could lead to a minor's parent finding out about her abortion is very real in communities where our patients reside. We draw our patients almost exclusively from the rural areas and small towns of New Hampshire. In these areas, the minor may have a relative or family acquaintance working at the courthouse. If the papers filed in a courthouse are not kept confidential, such persons could view them and report the abortion to the minor's parents. Similarly, if the courtrooms are not closed, there is a very real possibility that someone the minor knows could encounter her in the courtroom.

10. I also understand that the parental notice law does not make an exception for circumstances when delaying the abortion to comply with the notice requirements or to get a judicial bypass would seriously threaten a young woman's health. I understand that the only time a provider can go ahead with an immediate abortion is when the provider certifies that the abortion is necessary to prevent the minor's death and there is insufficient time to comply with the law's notice requirements. I fear that, without a proper health exception, minors who fear notifying their parents of their abortion decision will be deterred from seeking and obtaining abortions they need in urgent

medical circumstances. Such minors may well seek a judicial bypass, further delaying the procedure while their condition worsens. Others may simply delay seeking any help at all, leading to further deterioration of their condition with the possibility of permanent harm to their health. For these reasons, I believe the law must allow an immediate abortion where a minor's health would be endangered by delay.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 15, 2003

/s/ Rachel Atkins, P.A., M.P.H
Rachel Atkins, P.A., M.P.H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and **WAYNE GOLDNER, M.D.,** Plaintiffs,	)	
v.	)	CIVIL ACTION NO:
PETER HEED, Attorney General of New Hampshire, in his official capacity, Defendant.	)	

DECLARATION OF JAMIE ANN SABINO, ESQ.

JAMIE ANN SABINO, ESQ., declares and states the following:

1. I am an attorney licensed to practice law in Massachusetts. I am the Chair of the Judicial Consent for Minors Lawyer Referral Panel, a panel of lawyers trained to represent minors seeking judicial waivers of Massachusetts' parental consent for abortion law (the Panel). In this role, I have been working with minors seeking judicial bypasses for over twenty years.

2. In addition to my work with the Panel. I have extensive experience as a family law practitioner and have represented clients in other types of civil and criminal cases. I have represented parents, including pregnant and parenting teens, and children in child protective services cases. I have worked as a court appointed investigator and

have been appointed *guardian ad litem* in abuse and neglect cases. I have litigated cases in all departments of the Massachusetts trial court system, including juvenile court, family and probate court, and the district court.

3. I have read New Hampshire's Parental Notification Prior to Abortion Act (the Act). I submit this declaration in support of plaintiffs' motion for injunctive relief because, based on my experience with parental involvement laws and judicial bypass systems in Massachusetts and in other states, I am convinced that the Act will irreparably harm young women seeking abortions in New Hampshire.

Background

4. Since 1981, Massachusetts law has required minors to obtain the consent of their parents before they may have an abortion. (Until March 1997, the law required that the minor obtain the consent of both parents. For the last six years, however, the law has been interpreted to require the consent of only one parent.) For minors who do not wish to involve their parents or who cannot obtain their parents' consent, Massachusetts law provides a judicial bypass procedure. This bypass procedure allows a minor to consent on her own to an abortion if she can prove to a court either that she is mature enough and capable of providing informed consent, or, if she is not sufficiently mature, that her best interests would be served by allowing her to obtain an abortion without involving her parents.

5. Before the law went into effect in 1981, Planned Parenthood League of Massachusetts and lawyers from the Women's Bar Association and the National Lawyers

Guild came together to devise a system for educating clinics and minors about the bypass process and for assisting young women with that process. The participants in those meetings developed the Judicial Consent for Minors Lawyer Referral Panel (the Panel) to recruit and train lawyers to represent young women seeking judicial bypasses. Panel lawyers, who today number over 100, have represented approximately 98 percent of the adolescents who have sought a judicial bypass.

6. I have been a member of the Panel since 1981 and co-chair or chair of the Panel since 1983. As a Panel member, I have represented approximately sixty young women in judicial bypass proceedings and been involved in almost all appeals that have occurred under this statute. As co-chair (and now chair) of the Panel, I also review the case summaries that attorneys who represent young women file with the Panel. I estimate I have reviewed over 5,500 such summaries. I also meet regularly with attorneys representing adolescents, with judges who hear bypass cases, and with clinic workers who assist pregnant adolescents. In addition, I conduct periodic trainings for attorneys on how to represent adolescents seeking a bypass. I am co-author of the training materials given to these attorneys and I periodically provide updates on the law and the implementation of the statute. By reason of these activities. I am very familiar with the workings of the Massachusetts judicial bypass system and the experiences of adolescents dealing with that system. I also consult with attorneys and reproductive health care providers in other states that have or are considering implementation of parental involvement laws, conduct trainings in other states for lawyers who will represent minors in bypass proceedings, and have reviewed literature

concerning the implementation of parental involvement laws in other states.

7. The Panel has worked hard to make the bypass process function as effectively as it can, and we have had success in some areas. In fact, since the parental consent law went into effect in 1981, about 16,000 minors have gone through the bypass system. During that twenty-two-year period, there have been only fifteen denials.

Parental Involvement in Minors' Abortion Decisions

8. In my experience, most minors involve their parents in their decision to have an abortion. According to one nationally representative study I am familiar with, the majority of unmarried minors having abortions (61%) did so with the knowledge of one or both of their parents. Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions,* 24 Fam. Plan. Persp. 196, 199-200 & table 3 (1992).

9. The younger the minor, the more likely it is that she involves at least one parent in her abortion decision. Indeed, the study found that very few of the youngest minors obtained an abortion without the knowledge of at least one parent. For example, 90 percent of minors under the age of fifteen reported that one or both parents knew about their abortion. *Id.* at 200 & table 3.

10. Even for those minors unable to inform their parents of their abortion, the majority (52%, according to the study) include a trusted adult in their decision. *Id.* at 205 & table 8.

Reasons Minors Do Not Involve Their Parents In Their Decision

11. Although most adolescents do involve a parent in their decision to have an abortion, I know from my experience that there are many reasons why some adolescents cannot.

12. Some minors fear disclosure of their sexual activity and pregnancy will cause their parents to react violently. Adolescents who previously have been abused by their parents, including being struck, beaten, and subjected to severe verbal harassment, know that stress often triggers an abusive episode and thus realistically fear that news of their pregnancy will lead to an attack. Based on my experience, these fears are well-grounded; I have represented minors in abuse and neglect cases who have been subjected to such retribution after informing their parents of their pregnancy and intent to seek an abortion.

13. Likewise, minors whose pregnancy is the result of familial sexual abuse cannot safely share their abortion decision with their parents. Even notice to a non-abusing parent is often not a real option for a minor. For example, I remember the tragic story of one thirteen-year old girl who had been raped and impregnated by her mother's boyfriend. When the minor requested permission from her mother for an abortion, the mother called her a slut and threw her out of her home.

14. Other minors, who have not necessarily been abused before, have valid reasons to fear that discovery of their pregnancy will trigger first-time abuse. Some teens have been threatened by their parents with a variety of severe repercussions if they were to become pregnant, such as being beaten, being thrown out of the house, or

having all support cut off. Many of these teens have good reason to know that these are not just idle threats. For example, one teen I worked with had recently reunited with her family after running away from home. But when her family learned of her pregnancy and desire to have an abortion, she was thrown out of the house. She ended up having to live in a group home. I know of others who have seen sisters thrown out of the house or forced into an undesired teenage marriage after parents learned of their pregnancies.

15. In other cases, minors facing a stressful family situation elect to go to court to protect the fragile family unit from a burden they know will strain it beyond its limit. Often the family is in a state of chaos, dysfunction, or stress and the adolescent fears that news of her sexual activity, pregnancy, and desired abortion will be seriously harmful to the family. For example, Panel members have represented a teenager whose brother had committed suicide two weeks before; one whose mother had just been diagnosed with a brain tumor; another whose father had just lost his job; another whose father had just had a heart attack; and another whose father was brutally murdered two weeks before. These teens often feel that their parents are just barely coping with all the stress in their lives and that the additional impact of disclosure of their pregnancy would push their parents over the edge.

16. We see other teenagers who know that their parents would prevent them from obtaining the abortion or even going to court for a bypass if they learned of their pregnancy. These minors often have good reason to believe that their parents will act to prevent them from exercising their choice. For example, I recall one minor who sought a bypass because her parents had forced her to carry her

previous pregnancy to term against her will and she was determined not to let that happen again. I knew of another minor whose mother showed up at the bypass proceeding and told the judge that her daughter should be forced to carry the pregnancy to term in order to teach her responsibility. Although this minor was ultimately able to obtain a court order in her favor, because of her mother's involvement, an already difficult process became an adversarial and agonizing experience for her.

17. The reasons I have encountered as to why minors in Massachusetts do not involve their parents are equally true of minors in New Hampshire and throughout the United States. One study of minors who did not tell one or both parents about their abortion found that 14 percent did not tell their mother and eight percent did not tell their father for fear the parent would make the minor carry to term; 18 percent did not tell their mother and 13 percent their father for fear they would make the minor leave home; six percent reported not telling their mother and seven percent their father for fear they would be beaten; 25 percent did not tell their mother and 12 percent their father because the minor believed that the parent was under too much stress already; and at least 20 percent reported concern that telling a parent would cause problems between the minor's parents. *Parental Involvement in Minors' Abortion Decisions* at 202-03 & table 5.

18. At the other end of the spectrum, even some minors who have good relationships with their parents may be very strongly opposed to informing their parents of their pregnancy and decision to seek an abortion. These minors fear that their parents will be disappointed, that their parents will lose all faith and trust in them, and that their relationship with their parents will be irreparably

damaged. Some of these young women have never spoken to their parents about sex and feel unable to bring it up in the context of their pregnancy and desire to have an abortion. Whether rightly or wrongly, these young women so deeply believe they cannot inform their parents that they will take drastic steps – including taking actions that endanger their life and health – to keep their decision confidential. If the law does not allow them to access confidential abortions, these minors will ensure confidentiality through risky means. As one study reveals, 23 percent of minors said that, if parental notification were required, they would forego a safe and legal abortion. Nine percent said they would attempt a self-induced abortion or would obtain an illegal abortion. Another nine percent said they would carry their pregnancies to term. Approximately two percent said they would leave home rather than notify their parents about their pregnancy and planned abortion. The remaining three percent did not know what they would do. As the authors of the study concluded, these responses indicate "that a sizable proportion of teenagers believe that the notification of their parents would put them in a desperate situation and that they would be forced to resort to desperate measures to deal with it." Aida Torres et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services,* 12 Fam. Plan. Persp. 284, 288 (1980).

19. What is clear, in all of these cases, is the depth of the minor's conviction that she cannot tell a parent about the abortion. Going to court to seek a waiver of a parental involvement law is a stressful and difficult step for a teen to take. Adolescents who resort to a judicial bypass procedure are so desperate to avoid their parents finding out that they are willing to contact a lawyer, reveal some of

the most private details of their lives to a stranger, arrange transportation to the courthouse, repeat their personal information, and wait while another stranger decides whether they are entitled to make a decision that will have profound consequences for their life.

Minors Who Do Not Involve Their Parents Need Guarantees of Confidentiality

20. For minors who cannot involve a parent in their pregnancy and planned abortion, confidentiality is critical, and is always a paramount concern of those seeking a bypass. Most of the minors I have represented have expressed repeated concerns about the confidentiality of the process, and I have had to assure them each time that the bypass will be entirely confidential. Many of these minors clearly indicated they would not undergo the bypass process if it was not confidential. Indeed, I know of misinformed teens who thought they were required to inform their parents about the abortion procedure and therefore delayed doing anything – even going to the doctor or getting any advice about their pregnancy and abortion. In addition to these concerns about direct notification, minors fear that other people will find out about their abortion and tell their parents.

21. Consistent with my experience, numerous medical groups and researchers have found that guarantees of confidentiality are critical to ensuring that adolescents seek the reproductive health care they need. For example, a recent study in the Journal of the American Medical Association reported that nearly half (47%) of the sexually active teenage girls surveyed at Planned Parenthood clinics throughout Wisconsin would stop using *all*

sexual health care services at the clinics if parents had to be notified that they were seeking prescription contraceptives. (Ninety-nine percent of these young women, however, said they would continue having sexual intercourse.) Diane M. Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA 710, 712-13 (2002). Likewise, the American Academy of Pediatrics has found that "even a perceived lack of confidentiality in health care regarding sexual issues deters [minors] from seeking services." American Academy of Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 Pediatrics 746, 749 (1996). Moreover, the American Medical Association reports that the desire to maintain confidentiality about abortion has been one of the leading reasons for illegal abortion deaths since 1973. Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 83 (1993).

22. Minors' concern with confidentiality is well-founded. Research shows that if their confidentiality is breached, minors often suffer the harms of notification that they sought to avoid. Indeed, on [sic] study found that of those adolescents whose parents found out about their pregnancy without being voluntarily told by the daughter, a majority (58%) reported adverse consequences. Six percent reported quite serious consequences including physical abuse, being forced to leave home, or that their parents' health suffered. Ten percent said knowledge of the pregnancy caused problems between their parents. Such adverse consequences were two to four times as likely to occur when the parents discovered the pregnancy as when the daughter had voluntarily chosen to tell them. *Parental*

Involvement in Minors' Abortion Decisions, 24 Fam. Plan. Persp. at 204 & table 7.

23. Further, in my experience with minors in Massachusetts, I have found that some parents who inadvertently learn of their daughter's desire to seek an abortion will go so far as to interfere with, or obstruct, her access to a court. I know of cases in which young women failed to show up at scheduled court hearings and lost all touch with their attorneys as a direct result of parents discovering that the minors were seeking a judicial bypass. In one of these cases, I later learned, only because the minor's boyfriend contacted me, that the girl's mother was pressuring her into going through with the pregnancy.

24. Finally, I also know of several instances in which a minor seeking a judicial bypass had a relative or close family friend who worked in the courthouse. Understandably, these minors were extremely fearful that the relative or family friend would easily learn about the minor's effort to obtain a bypass and would inform the minor's parents. In these circumstances, knowing that the relative or family friend would not be allowed to enter the hearing or see the minor's court records, despite working in the courthouse, was of critical importance to these young women.

The Act's Bypass Lacks Specific Safeguards Necessary to Ensure Confidentiality

25. Based on my experiences, I have learned that if a bypass procedure is to provide a viable alternative to parental notice, it must have specific provisions explaining to court personnel the steps that must be taken in order to protect minors' confidentiality. I have reviewed the judicial

bypass procedure contained in the New Hampshire Act and it lacks these important provisions.

26. Although the Act says that "[p]roceedings . . . shall be confidential" and that an "expedited confidential appeal shall be available," it does not provide court personnel any specific instructions on what this means in the context of a judicial bypass proceeding. It does not, for example, instruct that hearings must be conducted in a closed courtroom, that records must be sealed, or that only essential court personnel can learn the minor's name. Without such instructions, court personnel cannot reasonably be expected to know what needs to be done to protect the confidentiality of minors seeking judicial waivers.

27. Based on my experience representing minors, parents, and others in a variety of cases, I know that judicial bypass proceedings present a set of confidentiality problems that simply do not arise in other cases. In complete contrast to the stringent confidentiality necessary for a bypass proceeding, in the vast majority of cases, it is understood that court rules require parties to use their names in pleadings, court hearings and arguments are open to the public, and court personnel are required to provide the public access to the docket and court records. Even in juvenile proceedings, which are not open to the general public, parents are summoned to attend the hearings and must be allowed access to the records. Judicial bypass cases, however, must be handled in an entirely different manner. Not only does a minor have a right of confidentiality vis-a-vis the public, but she also has the right vis-a-vis her parents. But nothing in New Hampshire's Act lets court personnel know this. Given that court personnel generally operate under the principle

that hearings and records are open to the public, or, at the very least, to the parents, it is unrealistic to expect court clerks to glean this difference from the Act's statement that "[p]roceedings . . . shall be confidential."

28. Indeed, that has been the experience in Massachusetts. When our parental consent law first came into effect, it contained language similar to New Hampshire's Act, simply providing that the bypass proceedings be confidential. Because the language of the Massachusetts statute alone provided no specific guidance, attorneys working with the court system developed forms, a procedure, and a standing order of the court to set forth the procedures for maintaining confidentiality in a bypass proceeding. Even with the standing order, there were enough confidentiality concerns that it was necessary to petition for guidelines from a justice of the Massachusetts Supreme Court. The standing order and guidelines specifically state, among other things, that the minors' names be redacted from the docket and the title of the case; that all court records and related materials be sealed and kept apart from other documents; that forms are used to ensure that the name of young woman appears in only one place – in a sealed envelope among the impounded material; and that hearings should be held in the judge's personal chambers and any unnecessary court personnel should be excluded.

29. In my experience, these guidelines have been essential to achieving a level of confidentiality in Massachusetts bypass cases that would otherwise have been lacking. Indeed, I have been informed by law clerks and a judge of instances in which parents, who somehow found out their daughter was seeking a bypass, called or showed up at the court demanding information. Both the clerks

and the judge told me that only because of the specific confidentiality guidelines did court personnel know that the records were to remain sealed and that the parents were not entitled to see the docket. This feedback confirms my belief that enforceable and specific instructions for bypass cases are an absolute minimum to an effective alternative to parental notification.

30. Because the New Hampshire Act lacks, as did the Massachusetts law, any of the most basic rules and guidelines for ensuring confidentiality, there is a significant risk that New Hampshire teens using the judicial bypass will face the harms of inadvertent disclosure of their pregnancy and/or decision to get an abortion. In my experience, this undermines the purpose of the bypass proceeding and in many cases leaves minors in essentially the same position as if they had been forced to notify their parents.

Conclusion

31. The Act presents a serious threat to the health, safety, and well-being of New Hampshire minors who for a whole host of reasons cannot involve their parents in their abortion decision. Because it lacks adequate protections to ensure that the process operates confidentially, it does not provide an effective opportunity for minors to obtain a waiver of the parental notice requirement. The Act should not be allowed to take effect, as it will irreparably harm young women seeking abortions in New Hampshire.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 7, 2003.

/s/ Jamie A. Sabino
JAMIE A. SABINO, ESQ.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and **WAYNE GOLDNER, M.D.,**	)	
Plaintiffs,	)	CIVIL ACTION NO:
v.	)	
PETER HEED, Attorney General of New Hampshire, in his official capacity,	)	
Defendant.	)	

MOTION FOR PRELIMINARY INJUNCTION WITH MEMORANDUM – ORAL ARGUMENT REQUESTED

NOW COME the Plaintiffs, through counsel, and petition this Court, pursuant to Fed. R. Civ. P. 65(b), for a preliminary injunction against enforcement of the Parental Notification Prior to Abortion Act, 2003 N.H. Laws ch.173, to be codified at RSA 132:24-:28 (the Act). A copy of the Act is attached to the Complaint as Exhibit A. The Act is scheduled to take effect December 31, 2003.

As grounds for this motion, plaintiffs allege as follows:

1. The Act prohibits a provider of abortion services from performing an abortion on an unemancipated minor without providing at least forty-eight hours advance notice

to a parent of the minor. Alternatively, the minor may obtain an order from a court waiving the notice requirement.

2. The Act contains no exception allowing the abortion to proceed without the delay required to notify a parent or obtain a judicial waiver when the delay would threaten the health of the minor patient. The Act contains only a limited exception to perform abortions necessary to prevent death.

3. The Act's provisions to waive notification provide that the court proceedings shall be confidential, but do not set forth specific provisions to protect confidentiality, including provisions for the sealing of records or the closing of hearings.

4. As shown in the accompanying memorandum of law filed in support of this motion, plaintiffs meet the standards for granting a preliminary injunction in that they are likely to succeed on the merits of their claims; they will be irreparably injured if the injunction is denied; the balance of hardships tips in their favor; and the injunction will serve the public interest. *Ross-Simons of Warwick v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996).

5. Plaintiffs have a strong likelihood of success on the merits because (a) the Act's failure to provide an exception from mandatory delay to protect a minor's health and only a limited exception to protect a minor's life, as well as its failure to adequately guarantee a confidential judicial procedure violates a minor's right to privacy as protected by the Fourteenth Amendment to the Untied States Constitution; (b) the Act is vague in violation of the due process clause of the Fourteenth Amendment by failing clearly to allow physicians to rely on their

good faith medical judgment in determining that an abortion is necessary to prevent death.

6. Plaintiffs and their minor patients will suffer irreparable injury if the Act is allowed to take effect because, among other things, the Act's failure to provide a health exception or an adequate life exception prevents abortion providers from performing emergency abortions necessary to protect minors' health and lives. In addition, the Act's failure to provide a confidential judicial bypass will deter minors from using that procedure and expose them to the risk of harm, including physical or emotional abuse from parental notification. Moreover, loss of constitutional rights is irreparable injury as a matter of law.

7. The balance of hardships favors the injunction because the defendant herein is not at risk of any harm.

8. Finally, the public interest is served by enjoining an unconstitutional statute and protecting the health and lives of young women until the matter can be decided on the merits.

9. Because this injunction will merely maintain the status quo and defendant will suffer no harm thereby, no bond should be required pursuant to Fed. R. Civ. P. 65(c).

MEMORANDUM STATEMENT (LR 7.1(a)(2))

10. In support of this motion, plaintiffs submit a memorandum of law, the Declarations of Wayne Goldner, M.D., Jamie Sabino, Esq. and Rachel Atkins, P.A., M.P.H., a proposed Order and their Complaint.

CONCURRENCE STATEMENT (LR 7.1(c))

11. Because of the nature of the relief sought and the fact that at this stage of the litigation opposing counsel has not yet entered an appearance, the undersigned has not obtained concurrence in the relief sought pursuant to Local Rule 7.1(c).

REQUEST FOR ORAL ARGUMENT (LR 7.1(d))

12. Oral argument is requested in order to assist the court in reaching a decision on this motion.

Wherefore, plaintiffs request that this Court set this motion for oral argument and grant this motion. A separate motion is filed today requesting expedited consideration of this motion.

Respectfully submitted,

Dated: November 17, 2003

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Counsel for Plaintiffs, Concord
Feminist Health Center,
Feminist Heath Center of
Portsmouth, and
Wayne Goldner, M.D.

CERTIFICATION

I hereby certify that on the 17th of November, 2003, I caused a copy of the foregoing Motion for Preliminary Injunction, along with the Declarations of Wayne Goldner, M.D.; Jamie Sabino, Esq.; and Rachel Atkins, P.A., M.P.H.; and a proposed Order to be served by hand on Attorney General Peter Heed, Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301.

/s/ Martin P. Honigberg
Martin P. Honigberg

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, AND WAYNE GOLDNER, M.D. Plaintiffs	*	No. C-03-491-JD
v.	*	
PETER HEED, ATTORNEY GENERAL OF NEW HAMPSHIRE, in his official capacity Defendant	*	

OBJECTION TO REQUEST FOR
DECLARATORY AND INJUNCTIVE RELIEF

The Defendant, by and through his counsel, the New Hampshire Office of the Attorney General, objects to the Plaintiff's request for declaratory and injunctive relief. In support of this motion, the Defendant submits the following:

1. 2003 N.H. Laws, Chapter 173, to be codified at RSA 132:24-28 is constitutional.

2. Plaintiffs are not likely to succeed on the merits, Plaintiffs will not suffer harm, the balance of hardships does not favor injunctive relief, and injunctive relief will not serve the public interest.

3. A contemporaneous memorandum of law is being submitted contemporaneously with this objection.

WHEREFORE, the Defendant respectfully requests that this Honorable Court:

A. Dismiss Plaintiff's complaint; and

B. Grant such other and further relief as may be just and proper.

Respectfully submitted,

PETER HEED
ATTORNEY GENERAL

By his attorneys,

/s/ Daniel J. Mullen
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December 3, 2003

Certificate of Service

I hereby certify that a copy of the foregoing has been mailed this day, first class, postage prepaid, to Martin P. Honigberg, Esquire, Sulloway & Hollis; Lawrence A. Vogelman, Esquire, Shuchman, Krause & Vogelman; Dara Klassel, Planned Parenthood Federation of America, Inc.; Jennifer Dalven and Corinne Schiff, American Civil Liberties Union Foundation.

/s/ Daniel J. Mullen
Daniel J. Mullen (#1830)

(17)

No. 04-1144

Supreme Court, U.S.
FILED
AUG 8 - 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND, CONCORD FEMINIST
HEALTH CENTER, FEMINIST HEALTH CENTER
OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Circuit Court of Appeals erred in holding that New Hampshire's Parental Notification statute was facially invalid because it did not contain a health exception and because the death exception was drawn too narrowly?

2. Whether the First Circuit Court of Appeals erred in holding that a facial challenge to New Hampshire's parental notification statute should not be governed by the "no set of circumstances" standard articulated in *United States v. Salerno*, 481 U.S. 739 (1987)?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioner, Kelly A. Ayotte,[1] Attorney General of the State of New Hampshire, is sued in her official capacity.

Respondents are Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth, and Wayne Goldner, M.D.

[1] Respondents initially sued Peter Heed, Attorney General of the State of New Hampshire, in the United States District Court for the District of New Hampshire in November, 2003. Kelly Ayotte became Attorney General in July, 2004.

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OTHER AUTHORITIES

Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235 (1994) 41

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Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 Colum. L. Rev. 173 (1999) 40, 41, 42

Suzanna Yates and Anita J. Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 Am. J. Pub. Health. 646 (1988) 22

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 390 F.3d 53 (1st Cir. 2004). It is set forth in the Appendix to the Petition for Writ of Certiorari at 1. The order of the United States District Court for the District of New Hampshire holding New Hampshire's Parental Notification Prior to Abortion Act unconstitutional and enjoining its enforcement is reported at 296 F. Supp.2d 59 (2003), and is set forth in the Appendix to the Petition for Writ of Certiorari at 24.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on November 24, 2004.

The jurisdiction of the court is invoked pursuant to 28 U.S.C. § 1254(1) (2002) to review a civil judgment. This Court granted the Petition for a Writ of Certiorari on May 23, 2005.

STATEMENT OF THE CASE

1. In June, 2003, the New Hampshire Legislature passed the Parental Notification Prior to Abortion Act (Act) with an effective date of December 31, 2003. N.H. REV. STAT. ANN. § 132:24-28.

The Act provides that no abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed until at least 48 hours after written notice has been delivered to one parent of the minor at the usual place of abode of the

parent. The physician or an agent must deliver the notice to the parent personally or by certified mail with return receipt requested and with restricted delivery to the addressee. N.H. REV. STAT. ANN. § 132:25.

The parental notification requirement has three exceptions: first, no notice is required if the attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice, N.H. REV. STAT. ANN. § 132:26, I(a); second, the persons who are entitled to notice certify in writing that they have been notified; and third, if the minor chooses not to notify her parent or guardian, a judicial bypass procedure is available where a judge may authorize an abortion provider to perform an abortion absent parental notification if the judge concludes that the pregnant minor is mature and capable of giving informed consent, or the pregnant minor's best interests would be served by waiving the notification requirement. N.H. REV. STAT. ANN. § 132:26, II. If the judicial bypass procedure is used, the pregnant minor may participate in the court proceedings on her own behalf and the court may appoint a guardian *ad litem* for her. The court must advise her that she has the right to court-appointed counsel and must provide her an attorney upon her request. Proceedings in court shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the minor. An expedited confidential appeal is available to any pregnant minor for whom the court denies an order authorizing an abortion without notification. Access to the courts is afforded twenty-four hours a day, seven days a week. N.H. REV. STAT. ANN. § 132:26, I, II.

Performance of an abortion in violation of the statute is a misdemeanor and is grounds for a civil action by a person wrongfully denied notification. A person is not liable "if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with this section are bona fide and true or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so." N.H. REV. STAT. ANN. § 132:27.

The Act also contains a severability provision, which provides that if any provision or application thereof to any person is held invalid, such invalidity will not affect the provisions or applications of the Act which can be given effect without the invoked provisions or applications. N.H. REV. STAT. ANN. § 132:28

2. On November 17, 2003, respondents, Planned Parenthood of Northern New England, Concord Feminist Health Center, Feminist Health Center of Portsmouth and Wayne Goldner, M.D. filed a complaint pursuant to 42 U.S.C. § 1983 seeking a declaratory judgment that the Act is unconstitutional and a preliminary injunction to prevent enforcement once it became effective. Joint Appendix (hereinafter "J.A.") at 3.

In an order dated December 29, 2003, the United States District Court for the District of New Hampshire (DiClerico, J.) declared the Act unconstitutional on its face and enjoined the Attorney General, and those acting pursuant to and under her direction and authority from enforcing the Act. Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. App.") at 23.

The district court found unconstitutional both the lack of an explicit health exception to protect the health of the pregnant minor, and the narrowness of the Act's exception for abortions necessary to prevent the minor's death. Pet. App. 33. The district court declined to rule on the constitutionality of the confidentiality provisions contained in the Act. Pet. App. 37-38. In its decision, the District Court relied in part on Dr. Goldner's declaration that describes medical complications which may occur during pregnancy, putting pregnant minors at risk and requiring prompt or immediate termination of the pregnancy. Pet. App. 35-36. While Dr. Goldner states in his declaration that there may be occasions during a pregnancy which require prompt or immediate termination of the pregnancy, he does not state whether he has had to use any medical procedures in an emergency situation during his many years of practice. J.A. 23-26.

The district court also stated that the judicial bypass provision of the Act necessarily delayed an abortion in a health emergency. Pet. App. 34. In a declaration of Jennifer Sabino, she related her experience with the judicial bypass provisions in Massachusetts. She stated that approximately 16,000 judicial bypass hearings had been conducted in Massachusetts and that on only 15 occasions had a judge ruled that an abortion should not occur. J.A. 39.

The First Circuit affirmed the district court, finding that in deciding whether the Act is facially invalid, the *undue burden standard* set forth in *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) should apply as opposed to the "no set of circumstances" standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987). Pet. App. 9. Relying on *Stenberg v. Carhart*, 530 U.S. 914

(2000), the First Circuit also ruled that complementing the undue burden standard, there is a specific and independent constitutional requirement that all abortion regulations must contain a health exception. The First Circuit determined that because the Act contains no explicit health exception, and because no health exception is implied by other provisions of New Hampshire law or by the Act's judicial bypass procedure, the Act is facially unconstitutional. Pet. App. 17-18.

The First Circuit further concluded that because the death exception contained in the Act was drawn too narrowly and because the Act fails to safeguard a physician's good faith medical judgment that a minor's life is at risk against criminal and civil liability, the Act was unconstitutional. Pet. App. 20.

Because the First Circuit found the Act in its entirety unconstitutional on the aforementioned grounds, it declined to address whether the confidentiality provisions contained in the Act are constitutional. Pet. App. 38.

SUMMARY OF THE ARGUMENT

New Hampshire's Parental Notification Prior to Abortion Act does not present a substantial obstacle to any woman's right to choose an abortion; instead, the Act provides pregnant minors with the benefit of parental guidance and assistance in exercising what is undoubtedly a difficult choice. This Court's well-established judgment that parental notification statutes are constitutional is "based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their

best interests at heart." *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 895 (1992). New Hampshire's Act promotes compelling state interests, not the least of which is protecting the health of the pregnant minor by providing an opportunity for parents to supply essential medical history information to the physician. New Hampshire's Act contains a judicial bypass provision and makes the courts available twenty-four hours a day, seven days a week to allow a pregnant minor to avoid the notification and waiting periods of the act when it is in her best interest – such as the hypothetical case where an emergent health issue arises and the minor does not wish to or cannot notify a parent.

The court of appeals' decision, facially striking down the entire act based principally on its conclusion that the lack of a general health exception rendered the act wholly invalid, misconstrued this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000). *Stenberg* did not hold that every regulation touching on abortion *in any way* has to include a general health provision to be constitutionally sound. A health exception is only required when there is substantial medical authority that supports the proposition that a specific regulation could pose a significant risk to women's health. Here, this type of substantial medical authority was not presented. Moreover, over fifteen years ago in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), a virtually identical parental notification statute, which did not contain a general health exception and contained the same death exception as New Hampshire's Act, was found to be constitutional. There is no evidence in the record that over the last decade and a half, Minnesota's act has operated to put minors at risk and surely had it operated

in such a manner, it would have been further challenged or repealed.

Even if this Court finds that New Hampshire's Act lacks a constitutionally required health exception or that its death exception is drawn too narrowly, the Act's judicial bypass provision nevertheless saves the act by providing a mechanism to address emergent health issues. The Act requires court availability twenty-four hours a day, seven days a week. There is no reason to believe that a judge will not act immediately if a pregnant minor's health is at stake. Contrary to the court of appeals' concerns about potential delays, New Hampshire is entitled to a presumption that judges will act in accordance with the Act's time prescriptions.

The court of appeals also failed to give proper deference to a state court's prerogative to interpret the exception in the act allowing a physician to perform an immediate abortion when "necessary to prevent the minor's death," N.H. REV. STAT. ANN. § 132:26, I(a), in a way that preserves the constitutionality of the Act. A New Hampshire state court could easily read the "necessity" language in the act to include in the good faith medical judgment of the physician. The Court of Appeals wrongfully concluded that New Hampshire's death exception is overly narrow.

Finally, the court of appeals' decision is undermined by its failure to apply the proper standard of review in evaluating the respondent's pre-enforcement, facial challenge to the Act. The court of appeals improperly construed this court's well-established test from *United States v. Salerno*, 482 U.S. 739, 745 (1987) that an act is constitutional on its face unless the challengers can establish "no

set of circumstances" under which it may validly operate as conflicting with *Casey's* substantive constitutional standard that an abortion regulation is invalid if it constitutes an undue burden on a woman's right to choose. Properly interpreting these standards together, in order to succeed on a facial challenge to an abortion regulation, the respondents should have been required to show that under no set of circumstances can New Hampshire's Act be applied in a manner which is not an undue burden. Applying the proper standard, respondent's facial challenge fails because New Hampshire's Act operates constitutionally in most, if not all, cases.

This Court's practice of avoiding unnecessary or premature decisions of constitutional issues and adjudicating constitutional questions only in concrete factual situations supports continued application of *Salerno*'s "no set of circumstances" test to all non-First Amendment facial challenges. The *Salerno* standard properly favors as-applied adjudication, allowing statutes to be refined on a case-by-case basis by preventing improper applications, rather than totally invalidating statutes which further legitimate state interests and are capable of constitutional application. This allows states the opportunity to interpret and enforce statutes to avoid constitutional infirmities, and limits unnecessary intrusion by federal courts.

There is no justification for departing from *Salerno's* logical rule to facial challenges for abortion regulations, and in fact, this court has applied the rule to such challenges. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990) ("*Akron II*"). The court of appeals' enjoinder of New Hampshire's notification act "based upon a worst-case analysis that may never occur," *Akron II*, 497 U.S. at

514, such as its concerns about a hypothetical case in which the Act might place a pregnant minor's health or life at risk, demonstrates the need for this Court to uphold the validity of the *Salerno* rule in abortion cases.

Finally, if the Court determines that New Hampshire's Act is unconstitutional in its application to emergent health or death cases, the relief provided by the First Circuit in invalidating the entire statute is not warranted. The New Hampshire Act contains a clear severability provision that if any provision "or the application thereof to any person or circumstances is held invalid, such invalidity shall not effect the provisions of this subdivision which can be given effect." N.H. REV. STAT. ANN. § 132:28. Severance is a state law issue. New Hampshire law recognizes that unconstitutional applications of a statute can be severed from the constitutional applications of the same. *See Woolf v. Fuller*, 174 A. 193, 196 (N.H. 1934). If this court affirms the judgment of the court of appeals that in certain applications the act operates invalidly then this Court should respect the New Hampshire legislature's express intent to preserve the Act's constitutional applications by issuing an injunction against only those applications which violate the law.

ARGUMENT

I. The New Hampshire Parental Notification Prior to Abortion Act Is Constitutional.

The New Hampshire Legislature was well within established constitutional bounds when it enacted the Parental Notification Prior to Abortion Act, N.H. REV. STAT. ANN. § 132:24-28. The joint opinion in *Casey* clarified that

states may enact laws "which in no real sense depriv[e] women of the ultimate decision," 505 U.S. at 875, and that "[r]egulations which do no more than create a structural mechanism by which the State, or a parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* at 877. New Hampshire's Act does not create a substantial obstacle to any woman's choice to have an abortion; it provides minors with the benefit of parental guidance and assistance in exercising a tough choice. The Act requires that one parent be notified of her child's choice to have an abortion forty-eight hours before a minor can exercise that choice. It has a judicial bypass mechanism to allow a minor to avoid the notification and waiting period provisions of the Act to address the minor's best interests, including any emergent health concerns, and contains an express provision to protect the life of the pregnant minor. N.H. REV. STAT. ANN. § 132:26. This Court has consistently rejected constitutional challenges brought against comparable state statutes that require a parent or guardian to be notified before an unemancipated minor undergoes an abortion and which include a waiting period. *See Lambert v. Wickland*, 520 U.S. 292 (1997); *Hodgson*, 497 U.S. at 417; *Akron II*, 497 U.S. 502; *H.L. v. Matheson*, 450 U.S. 398 (1981).

However, despite these prior decisions, and this Court's clear recognition of the important role parents play in assisting their unemancipated daughters in exercising their right to choose, the court of appeals struck down New Hampshire's entire notification act on its face based principally on its conclusion that *Stenberg* requires *all* regulations touching on abortion to include a general

health exception. *See Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 59 (1st Cir. 2004). The Court also concluded that the explicit death exception contained in the Act was drawn too narrowly. *See id.* at 64. The court of appeals decision rendering New Hampshire's Act unconstitutional on its face was incorrect and should be reversed by this Court for the following reasons: 1) the Act does not place an undue burden on a young woman's choice to have an abortion; 2) New Hampshire modeled its act after a Minnesota law which this Court validated fifteen years ago in *Hodgson*, 497 U.S. at 497, and which remains in effect; 3) *Stenberg* did not create a *per se* health exception requirement for all abortion regulations; 4) New Hampshire's Act protects the health of the pregnant minor through its judicial bypass provision; and 5) the court of appeals failed to give proper consideration to New Hampshire state law and this Court's decision in *Doe v. Bolton*, 410 U.S. 179, 191 (1973), in construing the death exception to the Act.

A. New Hampshire's Parental Notification Act Does Not Impose An Undue Burden On A Minor's Right To Choose.

"The very notion that the State has a substantial interest in potential life leads to the conclusion that not all [abortion] regulations must be deemed unwarranted." *Casey*, 505 U.S. at 876. Only those regulations which constitute an undue burden on a woman's right to choose are constitutionally deficient. "A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

New Hampshire's Act presents no barriers to a woman's right to choose. Instead, it properly "facilitates the wise exercise of that right. . . ." *Id.* at 877.

Parental notification statutes serve several compelling state interests, including protecting the emotional and physical health of the pregnant mother, vindicating the importance of the parent-child relationship, and promoting the family unit. *See Hodgson*, 497 U.S. at 445. As a result, this Court has consistently found such statutes to be constitutional. *See Lambert*, 520 U.S. at 297 (per curiam) (collecting cases); *Hodgson*, 497 U.S. at 417; *Akron II*, 497 U.S. at 520; and *H.L. v. Matheson*, 450 U.S. at 413. *Casey* re-affirmed the importance of these state interests when it distinguished the unconstitutional spousal consent provisions of Pennsylvania's Act from parental notification and consent statutes. *See Casey*, 505 U.S. at 895. It stated: "[t]hose enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart." *Id.*

In upholding a parental consent provision, *Casey* aptly noted, "[w]e have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." Hence, New Hampshire's Act, which contains a judicial bypass provision that allows a court to avoid its notification and waiting requirements if it is in the minor's best interests does not constitute an undue burden on a woman's right to choose.

Nevertheless, without even engaging in an analysis of whether the Act constitutes an undue burden, the court of appeals struck down New Hampshire's entire statutory scheme, in reliance on *Stenberg*, because it does not contain an express health exception. This perceived shortcoming of the act does not pose an undue burden on a woman's right to choose; no woman will be hindered from having an abortion as a result of the Act. Unlike the spousal consent provision struck down in *Casey* – where the Court relied upon data demonstrating the impact of the invalid provision on abused spouses – here there is no equivalent data in the record regarding a category of women whose health will be harmed by the operation of the Act. The Declaration of Dr. Goldner raises only generalized concerns about medical conditions that could require an emergency abortion in a hypothetical case, and it provides no statistics or medical research addressing the prevalence of these generalized health risks that are described. There is no evidence that Dr. Goldner has ever encountered such a case. Nor is there any evidence in the record from the forty-two other states that have parental notification or consent statutes[2] that physicians have had to perform immediate abortions to protect a woman's

[2] *See* ALA. CODE § 26-21-5; ALASKA STAT. § 18-16-060; ARIZ. REV. STAT. § 36-2152; CAL. HEALTH & SAFETY CODE § 123450; IDAHO CODE § 18-609A; IND. CODE § 16-34-2-4; KY. REV. STAT. ANN. § 311.732; LA. REV. STAT. ANN. § 40:1299.35.12; MASS. GEN. LAWS ch. 112, § 12S; ME. REV. STAT. ANN. tit. 22, § 1597-A, 1588; MICH. COMP. LAWS § 722.905; MISS. CODE ANN. § 41-41-57; MO. REV. STAT. § 188.028; N.J. STAT. ANN. § 9:17A-1.6; OHIO REV. CODE ANN. § 2929.12; 18 PA. CONS. STAT. § 3206; R.I. GEN. LAWS § 23-4.7-4; S.C. CODE ANN. § 44-41-30; TENN. CODE ANN. § 37-10-305; TEX. OCC. CODE § 164.052(a)(18); VA. CODE ANN. § 16.1-241; WIS. STAT. § 48.375; WYO. STAT. ANN. § 35-6-118.

health in a situation that could not have been addressed by New Hampshire's judicial bypass provision.

The constitution is not offended by a provision requiring notification of a parent when a minor's health is at risk. "[T]his Court has made clear that a state may promote but not endanger a woman's health when it regulates the methods of abortion." *Stenberg*, 530 U.S. at 931 (citations omitted). In that regard, parental notification can help protect a woman's health by ensuring that the physician has all the information needed to conduct the procedure without harming the minor. This parental involvement has been described as follows:

> [Notification] serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to the physician. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

Matheson, 450 U.S. at 411 (footnote omitted); *see also Akron II*, 497 U.S. at 518. ("[A]ppellees do not contest the superior ability of a physician to garner and use information supplied by a minor's parents upon receiving notice. We continue to believe that a state may require the physician himself or herself to take reasonable steps to notify a minor's parent because the parent often will provide important medical data to the physician.") (citation omitted). Parents can also assist minors, who are likely to be

less experienced in dealing with the medical profession, in selecting highly qualified health care providers and reviewing their qualifications, professional experience and medical advice.

In *Hodgson*, this Court upheld Minnesota's statute that is virtually identical to the New Hampshire Act. *See Hodgson*, 497 U.S. at 461 (opinion of O'Connor, J.). The fact that Minnesota's statute has operated for fifteen years, since this Court's decision, without any evidence that it infringes on women's health further demonstrates that New Hampshire's Act promotes a minor's health and is not an undue burden. The *Hodgson* court upheld Minnesota's law requiring notification of two parents, as well as a forty-eight hour waiting period prior to a minor's abortion with a judicial bypass procedure.[3] Aside from its less restrictive one-parent notification requirement, the New Hampshire Act is virtually indistinguishable from the Minnesota statute in *Hodgson*. Compare N.H. REV. STAT. ANN. § 132:24 with MINN. STAT. § 144.343(4). Neither the Minnesota statute nor the New Hampshire Act contain a general health exception. *See id.*

The First Circuit simply dismissed *Hodgson* by stating that the "Court did not consider a challenge to [the Minnesota] statute's lack of a health exception." *Heed*, 390 F.3d at 53. However, a close reading of *Hodgson* demonstrates that the Court was well aware of the lack of a health exception, yet it still upheld the constitutionality of the statute. The Court referenced the death exception numerous times, *see Hodgson*, 497 U.S. at 422, 426 n.7; *see*

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[3] A majority of the Court rejected a two parent notification requirement without a judicial bypass. *See id.* at 455 (Stevens, J.).

also id. at 493 (Kennedy, J. concurring in the judgment in part and dissenting in part.) That exception is identical to the death exception in New Hampshire's Act and does not contain a health exception. Although the *Hodgson* Court was not principally focused on it, the Court was aware that the statute lacked an explicit health exception, but it did not rule that provision patently unconstitutional, or even question its validity. Given this awareness and explicit reference to Minnesota's exception, the First Circuit's easy dismissal of *Hodgson* is not well-reasoned. Surely, had Minnesota's act infringed on the health of minors over the last fifteen years, it would have been further challenged in court or modified by the state legislature.

In addition, at least two other states have parental notification or consent statutes which do not contain an explicit health exception. *See* MO. ANN. STAT. § 188.028 (West 2004); N.D. CENT. CODE § 14-02.1-03.1 (2004). These statutes have been in effect for more than fifteen years, and the respondents have presented no evidence that minors have been placed at risk as a result of the operation of these statutes.

The absence of any evidence regarding actual health risks arising from these laws demonstrates the deficiency of allowing a facial challenge to an abortion regulation to proceed without requiring the challenger to establish that no set of circumstances exists under which the statute would be valid. *See infra,* § II. A statute with many constitutional applications could be invalidated based solely on hypothetical concerns that may never materialize.

B. There Is No *Per Se* Rule Requiring All Abortion Regulations To Contain A Health Exception.

Relying on *Stenberg*, the First Circuit ruled that the Act was unconstitutional because it did not contain an explicit exception to protect the health of the mother. *See Heed*, 390 F.3d at 60-62. In effect, the First Circuit created a *per se* rule that all statutes regulating abortion must contain a health exception in order to survive constitutional challenge. *See id.* at 59. The First Circuit has misread *Stenberg*. The Nebraska statute at issue in *Stenberg* was entirely different from a parental notification act as it attempted to altogether ban a method of abortion. The statute at issue in *Stenberg* attempted to proscribe partial birth abortions without any method for relief such as the judicial bypass in New Hampshire's Act. Moreover, the New Hampshire Act does not ban abortion, but simply seeks to promote the interest of minors in having the benefit of parental involvement. Thus, while the law at issue in *Stenberg* could endanger a woman's health by preventing her from receiving the safest method of abortion, New Hampshire's Parental Notification Act would not. The decision in *Stenberg* makes plain that the Court did not create a *per se* health exception rule in that case. At the outset, the Court was simply applying the principles of *Casey* to the circumstances of the Nebraska statute which completely banned D & X (partial birth) abortions: "[w]e shall not revisit those legal principles [set forth in *Roe v. Wade*, 410 U.S. 113 (1973) and *Casey*]. Rather, we apply them to the circumstances of this case." *Stenberg*, 530 U.S. at 921. Hence, the Court began its analysis of the case by expressly *denying* that it was enunciating any new legal principles beyond those previously set forth in *Roe v. Wade* and *Casey. Id.* The Nebraska

statute included an exception that would allow the D & X procedure to be performed if necessary to save the woman's life; it did not, however, include an exception that would allow the procedure to be used if necessary to preserve her health. Applying *Casey*, the Court held that "the governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother,'" because the Court has "made it clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion."

The *Stenberg* court then went on to discuss Nebraska's contention that a law does not require a health exception unless there is a need for such an exception. The Court did not expressly or impliedly reject that general proposition. Instead, the Court discussed the medical evidence presented at the district court level, and concluded that there was evidence in the record to support the conclusion that in some circumstances the D & X might be the safest procedure. 530 U.S. at 932. Therefore, based upon the actual medical evidence presented at the district court hearing, the Court concluded that a law banning the procedure must include a health exception:

> The upshot is a District Court finding that D & X significantly obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of opinion among some medical experts over whether D & X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. *Given these medically related evidentiary circumstances, we believe the law requires a health exception.*

Stenberg, 530 U.S. at 936 (emphasis added). Hence, the Court's holding was *not* that *all* laws regulating abortion methods must have health exceptions; rather, it was limited to the circumstances of the law banning the D & X procedure and the medical evidence in the record. The Court expressly rejected the idea that a state can *never* ban an abortion procedure simply because some doctors prefer it:

> By no means must a State grant physicians 'unfettered discretion' in their selection of abortion methods. But where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is 'necessary in appropriate medical judgment, for the preservation of the life or health of the mother.' 505 U.S. at 879. Requiring such an exception *in this case* is no departure from *Casey*, but simply a straightforward application of its holding.

Stenberg, 530 U.S. at 938 (emphasis added). The Court did *not* hold that *every* law regulating abortion in any manner requires a health exception. Here, there is no such record of substantial medical authority, similar to the record upon which the *Stenberg* court relied, to support the proposition that parental notification regulations require an explicit health care exception.

Stenberg's narrow holding regarding the basic need for a health exception in a statute banning partial birth abortions should not be mistaken for a broad decision that would clash with *Casey's* express endorsement of a health exception triggered only by "significant threats to the life or health of a woman." *Casey*, 505 U.S. at 880. The First

Circuit's creation of a *per se* rule that all abortion regulations must have a health exception would mean that a statute which requires abortion providers to keep records of the type of abortions performed and the ages of the women who had abortions would need a health exception. This is simply illogical and absurd.

C. The Judicial Bypass Provision Adequately Protects The Life And Health Of The Mother And Saves The Act From Any Alleged Constitutional Deficiency.

Even if this Court finds that the New Hampshire Act lacks a constitutionally required health exception, the Act's judicial bypass provision renders the statute constitutionally sound. "In a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid unduly burdening the minor's limited right to obtain an abortion." *Hodgson*, 497 U.S. at 461 (O'Connor, J. concurring in part and concurring in the judgment in part) (although two-parent notification requirement was unconstitutional, the law passed constitutional muster when coupled with a judicial bypass alternative); *see also Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (*Bellotti II*) ("[t]he opportunity for direct access to court ... is adequate to safeguard throughout pregnancy the constitutionally protected interests of a minor in the abortion decision").

The New Hampshire Act adequately protects the health of the mother. The Act provides that written notice must be given to an unemancipated minor's parent or guardian and that no abortion may be performed until at least 48 hours after notice has been delivered. N.H. REV. STAT. ANN. § 132:25, I. The Act provides exceptions where

an abortion is necessary to prevent the minor's death or where the parent or guardian certifies in writing that they have been notified. N.H. REV. STAT. ANN. § 132:26, I(a), (b). Additionally, if the minor chooses not to notify her parent or guardian, a judicial bypass procedure is available where a judge may authorize an abortion provider to perform an abortion if the judge concludes that the pregnant minor's best interest would be served. N.H. REV. STAT. ANN. § 132:26, II. The Act also provides that a person shall not be held liable under the penalty section of the Act if the person has attempted with reasonable diligence to deliver notice. N.H. REV. STAT. ANN. § 132:27.

The judicial bypass contained in the Act provides a method for protecting a minor's health by allowing a minor to obtain an immediate abortion when it is in her best interests. The Act requires the judicial bypass procedure to occur promptly and sets forth maximum time limits within which the courts may act, and there is nothing in the Act which would prevent a court from proceeding even more promptly. N.H. REV. STAT. ANN. § 132:26, II(b). The Act requires that a court be available twenty-four hours a day, seven days a week. N.H. REV. STAT. ANN. § 132:26, II(c). This portion of the judicial bypass section provides adequate protection for health emergencies. The provision that courts be available twenty-four hours a day, seven days a week plainly means that the courts should provide immediate relief in emergency situations, something which courts do routinely. Furthermore, the statute expressly says that the court is to give precedence over other matters and to "reach a decision promptly and without delay so as to serve the best interests of the minor." N.H. REV. STAT. ANN. § 132:26, II(b). The First Circuit's suggestion that someone might have to wait

fourteen days in an emergency does not make sense in light of the provision.[4] In the case of a medical emergency, access to a judge can be almost immediate. There is no reason to believe that a judge would not act expeditiously if the health of a minor is at issue. Indeed, a state may expect that its judges will follow mandated procedural requirements. *See Akron II*, 497 U.S. at 515. Courts routinely address time sensitive issues promptly, regardless of the time of day or night, in a variety of circumstances, such as restraining orders in domestic violence cases, search and arrest warrants in criminal cases, child protection orders and emergency health orders. In many instances, authorization for such procedures is given over the telephone. *See, e.g.*, N.H. REV. STAT. ANN. § 173-B:4 (telephonic domestic violence restraining order). Judicial bypass hearings in Massachusetts average twelve minutes and 92 percent of the hearings were less than or equal to 20 minutes. *See* Suzanne Yates and Anita J. Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 Am. J. Pub. Health. 646, 648 (1988). Additionally,

[4] *See Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964) as an example of how expeditiously courts act in medical emergencies. In that case, attorneys for Georgetown Hospital applied to the United States District Court for the District of Columbia for permission to administer blood to a woman who was a Jehovah's Witness. The teachings of that sect prohibited the injection of blood into the body. The District Court denied the application. Counsel for the hospital applied for an emergency writ to a single judge of the Court of Appeals. The judge called the hospital by telephone, spoke with a doctor and confirmed the representations made by counsel. The judge then went to the hospital, spoke with the woman's husband, the woman, and the doctors and then signed an order allowing the doctor to administer such transfusions as the doctors should determine were necessary to save the woman's life. This occurred within a span of one hour and twenty minutes. *Id.* at 1006-07.

the history in Massachusetts, relied upon by Planned Parenthood in the courts below, suggests that courts routinely authorize the abortion procedure to proceed. J.A. 39. Certainly, if an abortion is necessary for the preservation of the health or life of the minor, it would be in the pregnant minor's best interest and a court would authorize the procedure within minutes, if necessary.

Here, the First Circuit rejected the judicial bypass procedure as constitutionally inadequate because a minor's health unnecessarily could be at risk if delays in reaching a judicial decision took place. *Heed*, 390 F.3d at 62. By doing so, the court necessarily recognized that a judicial bypass alternative could serve as, or "stand in for," a health exception. *See id.* Nevertheless, possible delays "during which time a minor's health may be adversely affected," rendered the bypass inadequate. *Id.*

Because the New Hampshire Legislature has mandated that its state judges make decisions "without delay" to "serve the best interest of the pregnant minor," *see* N.H. REV. STAT. ANN. § 132:26, II(b), the First Circuit should have concluded that judges would act expeditiously to serve the best interests of pregnant minors. *See Akron II*, 497 U.S. at 515 ("a state may expect that its judges will follow mandated procedural requirements").

D. The Act's Exception Permitting A Physician To Perform An Immediate Abortion When Necessary To Prevent A Minor's Death Is Not Unconstitutional.

New Hampshire's Act permits a physician to perform an immediate abortion when an abortion "is necessary to prevent the minor's death and there is insufficient time to

provide the required notice." N.H. REV. STAT. ANN. § 132:26, I(a). The court of appeals struck down the death provision on its face for two reasons: (1) The court concluded that the Act's provision that an immediate abortion can be performed when necessary to prevent a minor's death failed to safeguard a physician's good-faith medical judgment concerning when a minor's life is at risk; and (2) The court found that the Act was drawn too narrowly because of a perceived concern that it may not be possible for an abortion provider to determine with certainty whether death will occur within or outside of the requisite 48 hour window of the Act.

The court of appeals failed to give New Hampshire state courts "the opportunity to construe [the] law to avoid constitutional infirmities." *New York v. Ferber*, 458 U.S. 747, 768 (1982); *see also Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*) (stating that Massachusetts' parental consent law "is susceptible of a construction by the state's judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem"). This Court, in *Doe v. Bolton*, 410 U.S. 179, 191 (1973) addressed an attack on a Georgia statute that made it a crime for a physician to perform an abortion except when it is "based upon his best clinical judgment that an abortion is necessary." *Id.* Appellants in that case, much like respondents here, contended that the word "necessary" did not warn the physician what conduct was proscribed, that the statute is wholly without objective standards and is subject to diverse interpretation, and that the doctor will err on the side of caution and will be arbitrary. *Heed*, 390 F.3d at 63. This Court stated that "[w]hether, in the words of the Georgia statute, 'an abortion is necessary' is a

professional judgment that the Georgia physician will be called upon to make routinely." *Id.* Most recently, in *Stenberg*, this Court stated:

> The word "necessary" in *Casey's* phrase "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion. Doctors often differ in their estimation of comparable health risks and appropriate treatment. And *Casey's* words "appropriate medical judgment" must embody the judicial need to tolerate responsible differences of medical opinion . . .

Stenberg, 530 U.S. at 937 (citation omitted).

Given these interpretations by this Court, there is no reason to believe that New Hampshire courts would not interpret New Hampshire's Parental Notification Act to protect the good faith judgment of abortion providers. *Cf. State v. Rollins-Ercolino*, 821 A.2d 953 (N.H. 2003) (where statute does not provide for specific mental state, the New Hampshire Supreme Court serves as final arbiter of Legislature's intent as it is expressed in words of statute considered as a whole).

The First Circuit's reliance on *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998) is inapposite. The *Voinovich* court construed an Ohio abortion regulation which had provisions containing subjective and objective elements in

that a physician must believe that an abortion is necessary and his belief must be objectively reasonable to other physicians. Because of this dual standard, a physician did not know against which standard his conduct would be tested and his liability determined. Accordingly, the Ohio Act did not adequately notify the physician that certain conduct is prohibited and the Act was unconstitutional. *Id.* at 204.

Likewise, the statute struck down in *Colautti v. Franklin*, 439 U.S. 379 (1979) suffered from a similar infirmity; a "double ambiguity" within the statute's terms. New Hampshire's Act is entirely distinguishable. It does not have a dual standard, and therefore is not ambiguous. Moreover, given the Court's sentiments in *Doe* and *Stenberg*, the Act can be interpreted to readily protect a provider's good faith judgment.

The court of appeals also critiqued the Act's 48 hour notice delay as forcing "physicians to either gamble with their patients' lives in the hopes of complying with the notice requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice." *Heed*, 390 F.3d at 63. This concern is unsubstantiated. The court of appeals' argument assumes that the statute will be a barrier to abortion providers who think that an abortion will be necessary to protect the life of the mother and who are unsure whether the procedure needs to occur within 48 hours.

However, the statute provides two clear options to abortion providers. First, a provider can seek assurance that those entitled to notice have actually been notified. *See* N.H. REV. STAT. ANN. § 132:26, I(b). A written note from a parent makes the 48 hour waiting period unnecessary. *Id.*

Second, a provider can make use of the judicial bypass process available 24 hours a day, 7 days a week. N.H. REV. STAT. ANN. § 132:26, I(c). The Act's provision of a judicial bypass makes it more than "fairly possible [to] construe [the] statute to avoid a danger of unconstitutionality." *Akron II*, 497 U.S. at 514. The above analyses also apply to the argument of respondents which the First Circuit did not address, that is that the death exception does not allow for circumstances in which abortion is the best, but not the only, option for saving a minor's life. Because the Act allows providers to rely on their good faith medical judgment, this argument fails. Furthermore, the provider can make use of the judicial bypass provision. This would cure any constitutional infirmity.

Accordingly, because the "death exception" contained in the Act can be construed constitutionally, minors face no risk that doctors will not do what is best for their patients. Hence, there is no undue burden for minors in need of life-saving abortions.

Given the entire statutory scheme, and the record in this case, New Hampshire's parental notification act should not be invalidated "on a facial challenge based upon a worst-case analysis that may never occur." *Id.*

II. THE CHALLENGE TO THE NEW HAMPSHIRE PARENTAL NOTIFICATION ACT FAILS BECAUSE IT CANNOT MEET THE "NO SET OF CIRCUMSTANCES" TEST FOR FACIAL CHALLENGES SET FORTH IN *UNITED STATES v. SALERNO*.

In *United States v. Salerno*, the Court articulated the following standard of review for facial challenges:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

481 U.S. 739, 745 (1987). This has long been the rule for facial challenges. In a long line of cases preceding *Salerno*, this Court defined a statute as facially invalid only if it was unconstitutional in every conceivable application. *See, e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 965 n. 13, 966 (1984); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 497 (1982); *see also New York State Club Ass'n v. New York*, 487 U.S. 1, 11 (1988) (post-*Salerno*).

In the abortion context, this Court has stated that when a facial challenge is made, individuals challenging the statute must show that "no set of circumstances exists under which the Act would be valid." *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990) (*Akron II*) (quoting *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (O'Connor, J., concurring in part and concurring in judgment)); *see also Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (facial challenge to federal regulations limiting the ability of recipients of federal funds to engage in abortion-related activities "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid") (internal quotation marks and citations omitted). Courts may not invalidate on its face a state statute regulating abortion "based upon a worst case analysis that may never occur." *Akron II*, 497 U.S. at 514. Despite this well-established principle, the First Circuit found *Casey* to be in tension with *Salerno* and rejected *Salerno* outright. *See Heed*, 390 F.3d at 57-58. This dismissal of *Salerno* was incorrect and should be reversed by this Court for the following reasons: (1) the *Salerno* test has long governed facial challenges and is consistent with this Court's traditional practice of adjudicating constitutional questions only in concrete cases and controversies; (2) *Salerno* is compatible with *Casey*'s undue burden standard, which simply identifies the substantive constitutional standard against which the *Salerno* test applies; (3) to the extent that *Casey*'s "large fraction" test is in tension with *Salerno*, that standard has only been applied by a plurality of this Court to a challenge to the constitutionality of a spousal notification provision; (4) even if the "large fraction" test applies, New Hampshire's Act passes constitutional muster because there is no large fraction of pregnant minors who would face significant health risks as a result of the Act; (5) there is no sound reason for this Court to create an abortion regulation exception to the *Salerno* test; and (6) even if the Act is found unconstitutional in cases of medical emergency, the Act should not be struck down on its face because the unconstitutional applications of the Act are severable.

A. *Salerno* Reiterates The Long Established Standard Governing Facial Challenges And Is Consistent With This Court's Traditional Practice Of Adjudicating Constitutional Questions Only In Concrete Cases And Controversies.

"The very foundation of the power of federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them." *United States v. Raines*, 362 U.S. 17, 20 (1960). "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" *Id.* (quoting *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). This requirement that an actual case or controversy exists, stemming from Article III of the United States Constitution, gives rise to the rule barring third party standing. Under that rule, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)); *see also Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-20 (1912). The rule barring third party standing "reflects two cardinal principles of our constitutional order: the personal nature of constitutional rights, and prudential limitations on our constitutional adjudication." *Ferber*, 458 U.S. at 767 (citations omitted).

Because constitutional rights are personal in nature, and resolution of a particular case or controversy presented to a court generally can be achieved by a pronouncement on the constitutionality of the concrete application presented, challenges to the constitutionality of a law should typically take the form of an "as-applied" challenge. A successful as-applied challenge renders the statute invalid only insofar as it applies to the litigant's activities; thus, the court's involvement is appropriately limited to that which is necessary to adjudge the legal rights of the litigants actually before the court. By focusing on the statute's application in the present case, rather than hypothetical applications of the statute to third parties, the court avoids "unnecessary pronouncement on constitutional issues" and "premature interpretations of statutes in areas where their constitutional application might be cloudy." *Raines*, 362 U.S. at 22. This leaves open the possibility that in a future case "a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented." *Id.; see also Ferber,* 458 U.S. at 768 (noting that the traditional rule barring third party standing "fulfills a valuable institutional purpose; it allows state courts the opportunity to construe a law to avoid constitutional infirmities").

Under the traditional rule for facial invalidation, a statute which can be constitutionally applied is not invalid on its face. *Salerno*, 481 U.S. at 745. The only exception to this general rule of facial invalidity is the overbreadth doctrine of the First Amendment. *See Vincent*, 466 U.S. at 796-99 (recognizing two different ways in which a statute may be deemed facially invalid – "either because it is unconstitutional in every conceivable application, or

because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad' "); *see also Salerno*, 481 U.S. at 745 (noting that this Court has "not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment"). The overbreadth doctrine exists only in the First Amendment context, and "is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statute will chill free expression." *See City of Chicago v. Morales*, 527 U.S. 41, 79, n. 2 (1999) (Scalia, J., dissenting).

Limiting overbreadth to the First Amendment is not only consistent with this Court's prior application of the doctrine,[5] but also preserves the proper balance between courts and legislatures by ensuring that courts decide only concrete cases and actual controversies. The practice of as-applied invalidation, favored under the *Salerno* standard, is supported by principles of federalism and institutional limitations on courts. *See J. H. Munson Co.*, 467 U.S. at 947 (Rehnquist, J., dissenting, joined by Burger, C.J., Powell, J., and O'Connor, J.) (explaining the advantages of as-applied invalidation, including that "it is less intrusive on the legislative prerogative and less disruptive of state policy[,]" and "allows state courts the opportunity to construe a law to avoid constitutional infirmities"). As this Court stated in *Younger v. Harris*, 401 U.S. 37, 52 (1971),

[5] Even in the First Amendment context, this Court has recognized that application of the overbreadth doctrine is "strong medicine" which should be employed by the Court "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. "In the development of the overbreadth doctrine, the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule." *Vincent*, 466 U.S. at 799.

> The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 1 Cranch 137 (1803). But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them.

In exercising its Article III jurisdiction, this Court " 'is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Raines*, 362 U.S. at 21 (quoting *Commissioners of Emigration*, 113 U.S. at 39). When courts focus on concrete factual situations, they face "flesh-and-blood legal problems with data relevant and adequate to an informed judgment." *Ferber*, 458 U.S. at 768 (citations and quotations omitted). This "practice of adjudicating difficult and novel constitutional questions only in concrete factual situations," results in "adjudications [that] tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead [the Court] into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication." *Id.* at 780-81 (Stevens, J., concurring); *see also J.H. Munson Co.*, 467 U.S. at 985 (Rehnquist, J., dissenting, joined by Burger, C.J., Powell, J., and O'Connor, J.) ("[M]isunderstanding and ungrounded speculation are

the natural hazards of overbreadth analysis. When the Court's sights are not focused on the actual application of a statute to a specific set of facts, its vision proves sadly deficient.").

Consistent with these principles, the *Salerno* standard favors as-applied relief, permitting total facial invalidity only where the challenger can establish no set of circumstances under which an act can operate validly. This practice respects coordinate branches of government by limiting courts' review to concrete cases and controversies, and "reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 610-11; *see also Akron II*; *Raines*, 362 U.S. at 22 ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."). As-applied adjudication also "fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities." *Ferber*, 458 U.S. at 768.

B. There Is No Valid Reason Why The *Salerno* Test Should Not Apply To Abortion Regulations.

There is no justification to depart from these traditional practices in reviewing the constitutionality of abortion regulations. This Court has itself applied the *Salerno* standard in upholding abortion regulations against facial challenges, *see Rust*, 500 U.S. at 173; *Akron II*, 497 U.S. at 502; and the plurality in *Casey* did not change this well-established rule for facial challenges in the abortion context. Federal courts' pronouncements on the constitutionality of state statutes regulating abortion

should go no further than what is necessary to adjudicate the rights in particular cases between the litigants brought before the Court.

1. *Casey*'s Undue Burden Standard Does Not Replace The *Salerno* Test For Facial Challenges To Abortion Regulations.

Casey established as the measure of constitutionality of an abortion regulation whether "its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion . . . ," therefore creating an undue burden on a woman's right to choose. 505 U.S. at 878. The plurality's application of the "large fraction" test in invalidating the spousal notification provision in *Casey* has created confusion as to whether the undue burden standard replaces the *Salerno* test for facial challenges to abortion regulations. It does not. The *Salerno* test is not in tension with the undue burden test, and the "large fraction" test used by the *Casey* plurality at most demonstrates an intent to apply overbreadth analysis to spousal notification provisions, not to reject the *Salerno* standard in its entirety in the abortion context. Had the Court intended to depart so drastically from the longstanding rule governing facial challenges, one would expect an explicit holding on the issue.

Casey did not overrule the *Salerno* standard for abortion cases; rather, it simply identified that the measure of constitutionality is the "undue burden" test. *Salerno* is compatible with this test. *See Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997) ("In order to succeed, Appellants are required to show that under no set of circumstances can the Act be applied in a manner which is not an undue burden . . . "). *Casey* no more creates a new

standard of review for facial challenges to abortion regulations than does the "reasonable foundation test" for INS regulations. *See Reno v. Flores*, 507 U.S. 292, 301, 309 (1993) (invoking *Salerno* standard and measuring the constitutionality of the regulation under the "reasonable foundation test"); *see also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (citing the *Salerno* rule); *Babbitt v. Sweet Home Chapter of Communities for Great Oregon*, 515 U.S. 687, 699 (1995) (facial challenge asserts that a challenged statute or regulation is invalid "in every circumstance"); *Rust v. Sullivan*, 500 U.S. at 173 (applying the *Salerno* rule to the facial challenge of an abortion-related regulation); *Akron II* (same); *New York State Club Assn., Inc.* 487 U.S. at 11-12 (noting that facial challenges are based on the claim that a statute is unconstitutional in all of its applications).

In any event, even if the plurality in *Casey* intended to create an abortion-regulation exception to the *Salerno* test through the "large fraction" test, that test only applies to challenges to the constitutionality of a spousal notification provision. The "large fraction" test does not appear in the plurality's discussion defining an "undue burden," *see Casey*, 505 U.S. at 877, and is only applied by the plurality in addressing the constitutionality of the spousal notification provision. *Casey* did not apply the "large fraction" test in upholding Pennsylvania's parental consent statute. 505 U.S. at 899. In fact, *Casey* explicitly declared that its invalidation of the spousal notice provision, through application of the "large fraction" test, "in no way" called into question parental involvement statutes. 505 U.S. at 895. Nor did the *Stenberg* Court apply the "large fraction" test in striking down Nebraska's ban on partial birth abortions. 530 U.S. at 938-46 (discussing undue burden

Nebraska partial birth abortion statute places on women without mentioning large fraction test).

Any exception adopted by the *Casey* plurality through application of the "large fraction" test is limited to challenges to spousal notification provisions. Respondents in this case do not raise such a challenge to the constitutionality of New Hampshire's Act; therefore, the traditional *Salerno* standard, not the "large fraction" test, applies. Under that standard, the Act may not be struck down in its entirety as facially unconstitutional simply because in some conceivable situations it may be applied unconstitutionally. Thus, even if this Court finds that New Hampshire's Act fails to preserve the health or life of minors in certain emergency situations, the statute is only unconstitutional as applied to that discrete group of individuals.

2. Even If *Casey*'s "Large Fraction" Test Applies, New Hampshire's Act Passes Constitutional Muster.

New Hampshire's Parental Notification Act clearly passes constitutional muster even under *Casey*'s large fraction test. Under the large fraction test, an abortion regulation constitutes an undue burden, and is therefore invalid, if "in a large fraction of cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Casey*, 505 U.S. at 895. Applied to the respondent's claim that the Act fails to preserve the health or life of pregnant minors, this standard requires a showing that the abortion restriction at issue will create significant health risks in a large fraction of cases in which it is relevant. *See Casey*, 505 U.S. at 880 (noting that an abortion restriction would be invalid if its operation creates "significant health risks").

In determining whether a regulation creates significant health risks in a "large fraction" of cases, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894. Thus, in measuring New Hampshire's Parental Notification Act for consistency with the Constitution, the controlling class of women is those minors seeking abortions who do not wish to notify a parent and who do not qualify for a waiver of notice under N.H. REV. STAT. ANN. § 132:26. *See Casey*, 505 U.S. at 895 (selecting as the class of women affected by the spousal notification provision "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement").

Because N.H. REV. STAT. ANN. § 132:26 waives the notice requirement in cases where an "abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice," the most serious medical emergencies are unaffected by the notification requirement and a life-saving abortion may proceed immediately. In addition, the judicial bypass provision removes from the control group those minors who are "mature and capable of giving informed consent" and those minors, regardless of maturity, for whom performance of an abortion without parental notification would be in their best interests. N.H. REV. STAT. ANN. § 132:26, II. The group of women for which the Act constitutes a restriction, therefore, is those minors who are not mature and capable of giving informed consent on their own, and whose best interests would not support waiving the parental notification requirement. The vast majority of these women would face no health complications related to their pregnancies,

and in those cases where complications arose, the vast majority of those situations would not require an immediate abortion in order to preserve the health of the mother.

Moreover, the respondents have failed to identify *any* fraction, let alone a *large fraction*, of cases in which New Hampshire's Parental Notification Act would create significant health risks to women. Although Dr. Goldner's declaration describes medical complications which may occur during pregnancy requiring prompt or immediate termination of the pregnancy, he does not identify a single circumstance in which he has actually needed to perform such an emergency abortion. Nor do the respondents point to any studies indicating that emergency abortions are sometimes necessary to preserve the health of a woman. In contrast, the District Court in *Casey* "heard the testimony of numerous expert witnesses, and made detailed findings of fact regarding the effect of [the spousal notification provision]." *Casey*, 505 U.S. at 888. In addition, this Court noted that the District Court's findings were "supported by studies of domestic violence." *Id.* at 891.

There is clearly no "large fraction" of unemancipated pregnant minors who would face significant health risks as a result of this Act. To facially invalidate a statute based upon a declaration of one abortion provider who states that a medical emergency may occur which would require a prompt abortion, without any evidence that the abortion provider himself has *ever* experienced such a situation or is aware of *any* other physician who has experienced such a situation, is error. Because New Hampshire's Parental Notification Act will not create significant health risks in a large fraction of cases in which the Act is relevant, the Act is facially valid even under *Casey*'s large fraction test.

3. There Is No Sound Reason For The Court To Create An Abortion-Regulation Exception To The *Salerno* Test.

The exception to the general rule of facial invalidity set forth in *Salerno* is the overbreadth doctrine of the First Amendment. *See Salerno*, 481 U.S. at 745; *Vincent*, 466 U.S. at 796-99. The Court recognized the overbreadth exception in the First Amendment context because of the special significance First Amendment rights have to a free and open government, setting them apart from other constitutional rights and liberties. *See* Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 Colum. L. Rev. 173, 201-08 (1999). As this Court stated in *Thornhill v. Alabama*, 310 U.S. 88 (1940),

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. . . . Abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

Id. at 95; *see also Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (citing Justice Holmes for the proposition that there is a "'preferred position of freedom of speech'" because "those liberties of the individual which history has attested as the indispensable conditions of an

open as against a closed society come to this Court with a momentum for respect. . . ."); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (noting the belief of the framers of the Constitution that exercise of First Amendment rights "lies at the foundation of free government by free men"). "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

Other fundamental constitutional rights, while important to individuals, are simply not as important to a free and open government. This does not mean individuals claiming violations of other constitutional rights are without relief. As-applied relief is sufficient to protect individual's constitutional rights, since courts are capable of adjudicating as-applied challenges expeditiously without impairing constitutional rights. Yet, some commentators argue that the *Salerno* standard is not workable in abortion cases due to the time sensitive nature of pregnancy. *See* Michael C. Dorf, *Facial Challenges to State & Federal Statutes*, 46 Stan. L. Rev. 235, 270 (1994) ("Due to pregnancy's temporary nature, pregnant women may find case-by-case relief from abortion restrictions particularly impractical"). This argument should be rejected by this Court as it presumes judicial foot dragging, even though courts act promptly in numerous emergent situations. It also "ignores the reality of how abortion litigation takes place." Martin, *supra*, at 212. Most challenges, such as the present case, are brought by abortion providers, who have

not been hesitant to bring such suits. *See Casey*, 505 U.S. at 845 ("Before any of these provisions took effect, the petitioners, who are five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services, brought this suit seeking declaratory and injunctive relief."). In *Singleton v. Wulff*, 428 U.S. 106 (1976), this Court upheld the standing of abortion providers to vindicate the rights of their patients. Just as in the case of a judicial bypass, nothing would prevent an abortion provider from bringing an expedited case to enjoin the application of a statute against a particular woman. Martin, *supra*, at 213.[6] Moreover, extending the overbreadth doctrine to abortion cases to allow facial invalidation of statutes which are capable of constitutional application "impermissibly interferes with the state process of refining and limiting – through judicial decision or enforcement discretion – statutes that cannot be constitutionally applied in all cases covered by their language." *Ada v. Guam Soc'y of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting from denial of certiorari, joined by Rehnquist, C.J., and White, J.). This Court has declined to do so even when an abortion statute with a manifestly unconstitutional scope may nevertheless be applied constitutionally in some set of circumstances. *See Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam) (upholding a substantially similar statute as that which was invalidated in *Roe* against non-physicians). Total invalidation of a statute, such as New Hampshire's Act, which has many constitutional applications, does not serve

[6] An as-applied challenge also has the impact of stare decisis. Therefore, women who are similarly situated will not necessarily have to bring their own challenge to an abortion regulation.

the public interest because doing so would place beyond the reach of the law those whose conduct is not constitutionally protected. *See* Alfred Hill, *Some Realism about Facial Invalidation of Statutes*, 30 Hofstra L. Rev. 647, 665 (2002).

As Justice Kennedy observed in his dissent in *Stenberg*, the federal court's act of enjoining the enforcement of the state statute before it was applied or interpreted by the state "denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute." 530 U.S. at 979 (Kennedy, J., dissenting, joined by Rehnquist, C.J.). Having noted that "*Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate," *id.* at 961, Kennedy lamented that, "[t]his cannot be what *Casey* meant when it said we would be more solicitous of state attempts to vindicate interests related to abortion. *Casey* did not assume this state of affairs," *id.* at 979.

4. Even If The New Hampshire Parental Notification Act Is Found Unconstitutional In Cases Of Medical Emergency, Those Unconstitutional Applications Of The Act Are Severable.

The *Salerno* test presumes that unconstitutional applications of a statute may be severed from its constitutional applications. Such a presumption is especially appropriate where a state statute contains an express severability provision. Severability is a state law issue, *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam), and here the New Hampshire legislature has specifically expressed its desire that the statute be severed so as to

preserve its constitutional applications. This Court should respect that state judgment.

The New Hampshire Parental Notification Act contains a severability provision which provides:

> If any provision of the subdivision *or the application thereof to any person or circumstance* is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications, and to this end, the provisions of this subdivision are severable.

N.H. REV. STAT. ANN. § 132:28 (emphasis added).

In New Hampshire "[t]he well recognized rule of statutory construction to be employed merely adopts the more probable intention of the legislature that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved." *Fernald v. Bassett*, 107 N.H. 282, 285, 220 A.2d 739, 742 (N.H. 1966). This rule of construction allows severance of both invalid provisions and invalid *applications*. *See Woolf v. Fuller*, 174 A. 193, 196 (N.H. 1934) (recognizing "principle of construction that when a statute . . . is valid in some of its applications but not in others, it is to be read as though the latter were excepted from its operation"); *see also Opinion of the Justices*, 190 A. 801, 806 (N.H. 1937) (noting that even if "some specified details or applications" of a bill may be objected to on constitutional grounds, such unconstitutionality "would not invalidate the act in its entirety if its general purpose can still be given effect"); *Aldrich v. Wright*, 53 N.H. 398, 399 (1873) (as the legislature is not presumed to have intended to pass a void act, a statute with unconstitutional applications is nevertheless "held valid by giving it a construction compatible with the

constitution, making it applicable only to those cases to which it can be constitutionally applied."); *Opinion of the Justices*, 41 N.H. 553, 555 (1861) ("The rule of construction universally adopted is, that when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom, or cases in which it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution."). Therefore, the judiciary must uphold the constitutionality of legislative enactments where it is possible to invalidate only the unconstitutional application of a statute.

Here, the most the respondents have alleged is that the statute might conceivably operate unconstitutionally in a very small percentage of situations where a medical emergency is present. Even if true, that does not justify facial invalidation of the entire statute in all its applications. As-applied relief, rendering unconstitutional only those applications where a medical emergency is present, would preserve the health and life of pregnant minors without unnecessarily intruding on the state legislature's prerogative and completely negating the legitimate state interests underlying the law. *See J.H. Munson Co.*, 467 U.S. at 977 (Rehnquist, J., dissenting, joined by Burger, C.J., Powell, J., and O'Connor, J.) (recognizing the benefits of refining a law on a case-by-case basis by preventing improper applications, rather than suspending enforcement of the statute entirely, because in the meantime the interest underlying the law can still be served by its enforcement within constitutional bounds).

It is clear that the overall purpose of the statute in notifying parents so that they can assist their minor children in the resulting impact on the minor's physical and mental health and so that necessary medical information may be given to the medical provider will be preserved if this Court invalidates the Act only as applied to circumstances of medical emergency. Invalidating the entire statute when it can be constitutionally applied in the vast majority of situations is unnecessary and contrary to the well-established *Salerno* rule limiting facial invalidation to only those situations where the unconstitutional applications of a statute can not be severed from its constitutional applications.

CONCLUSION

The decision of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Dated August 8, 2005

APPENDIX

STATUTORY PROVISIONS INVOLVED

New Hampshire Parental Notification Prior to Abortion Act

[N.H. REV. STAT. ANN. § 132:24
effective December 31, 2003.]

132:24 Definitions In this subdivision:

I. "Abortion" means the use or prescription of any instrument, medicine, drug or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.

II. "Commissioner" means the commissioner of the department of health and human services.

III. "Department" means the department of health and human services.

IV. "Emancipated minor" means any minor female who is or has been married or has by court order otherwise been freed from the care, custody and control of her parents.

V. "Guardian" means the guardian or conservator appointed under N.H. REV. STAT. ANN. § 464-A, for pregnant females.

VI. "Minor" means any person under the age of 18 years.

VII. "Parent" means one parent of the pregnant girl if one is living or the guardian or conservator if the pregnant girl has one.

[N.H. REV. STAT. ANN. § 132:25
effective December 31, 2003.]

132:25 Notification Required

I. No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to N.H. REV. STAT. ANN. § 464-A because of a finding of incompetency, until at least 48 hours after written notice of the pending abortion has been delivered in the manner specified in paragraphs II and III.

II. The written notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

III. In lieu of the delivery required by paragraph II, notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and with restricted delivery to the addressee, which means the postal employee shall only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

[N.H. REV. STAT. ANN. § 132:26
effective December 31, 2003.]

132:26 Waiver of Notice

I. No notice shall be required under N.H. REV. STAT. ANN. § 132:25 if:

(a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice; or

(b) The person or persons who are entitled to notice certify in writing that they have been notified.

II. If such a pregnant minor elects not to allow the notification of her parent or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize an abortion provider to perform the abortion if said judge determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests and shall authorize an abortion provider to perform the abortion without such notification if said judge concludes that the pregnant minor's best interests would be served thereby.

(a) Such a pregnant minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.

(b) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best

interest of the pregnant minor. In no case shall the court fail to rule within 7 calendar days from the time the petition is filed. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(c) An expedited confidential appeal shall be available to any such pregnant minor for whom the court denies an order authorizing an abortion without notification. The court shall make a ruling within 7 calendar days from the time of the docketing of the appeal. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant minor at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant minor 24 hours a day, 7 days a week.

[N.H. REV. STAT. ANN. § 132:27
effective December 31, 2003.]

132:27 Penalty. Performance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to

comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

[N.H. REV. STAT. ANN. § 132:28
effective December 31, 2003.]

132:28 Severability. If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications, and to this end, the provisions of this subdivision are severable.

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Supreme Court of the United States

KELLY A. AYOTTE,
ATTORNEY GENERAL OF NEW HAMPSHIRE, *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD
OF NORTHERN NEW ENGLAND, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL ASSOCIATION, NEW HAMPSHIRE MEDICAL SOCIETY, AMERICAN ACADEMY OF PEDIATRICS, NEW HAMPSHIRE PEDIATRIC SOCIETY, SOCIETY FOR ADOLESCENT MEDICINE, AMERICAN PSYCHIATRIC ASSOCIATION, NORTH AMERICAN SOCIETY OF ADOLESCENT AND PEDIATRIC GYNECOLOGY, NATIONAL MEDICAL ASSOCIATION, AND AMERICAN PUBLIC HEALTH ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Planned Parenthood of Northern New England v. *Heed*, 390 F.3d 53 (1st Cir. 2004) 18, 30
Planned Parenthood of Wisconsin v. *Doyle*, 162 F.3d 463 (7th Cir. 1998) 12
Planned Parenthood v. *Casey*, 505 U.S. 833 (1992) 12, 13
Planned Parenthood v. *Owens*, 107 F. Supp. 2d 1271 (D. Colo. 2000) 15
Planned Parenthood v. *Wasden*, 376 F.3d 908 (9th Cir. 2004) 15
Stenberg v. *Carhart*, 530 U.S. 914 (2000) 12
Thornburgh v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) 12
United States v. *Salerno*, 481 U.S. 739 (1987) 26

STATUTES

N.H. Rev. Stat. Ann.
§ 132:24 8
§ 132:25 6
§ 132:26 ..... 6, 29
§ 132:27 19
§ 626:2 30

OTHER AUTHORITIES

AAP Committee on Adolescence, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 Pediatrics 746 (May 1996) 19, 20
ACOG Practice Bulletin: Diagnosis and Management of Preeclampsia and Eclampsia (2002) 17
ACOG Practice Bulletin: Premature Rupture of Membranes (1998) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Adler, Nancy E., et al., *Abortion Among Adolescents*, Am. Psych. 211 (Mar. 2003) 21, 24, 25

Alan Guttmacher Institute, *Facts in Brief: Induced Abortion in the United States* (2005), *available at* http://www.agi-usa.org/pubs/fb_induced_abortion.html 14, 20, 25

Alan Guttmacher Institute, *Facts in Brief: Teen Sex and Pregnancy* (1999), *available at* http://www.agi-usa.org/pubs/fb_teen_sex.html..... 16

Alan Guttmacher Institute, *State Policies in Brief: Parental Involvement in Minors' Abortions* (Sept. 23, 2005), *available at* http://www.agi-usa.org/statecenter/spibs/spib_PIMA.pdf..... 21

Alan Guttmacher Institute, *U.S. Teen Pregnancy Statistics: Overall Trends, Trends by Race and Ethnicity and State-by-State Information* (Feb. 19, 2004), *available at* http://www.guttamacher.org/pubs/state_pregnancy_trends.pdf..... 21

Albrektsen, G., et al., *Breast Cancer Risk by Age at Birth, Time Since Birth and Time Intervals Between Births: Exploring Interaction Effects*, 92 Br. J. Cancer 167 (2005) 25

American College of Obstetricians & Gynecologists, *ACOG Statement of Policy: Access to Reproductive Health Care for Adolescents* (July 2000)..... 19

American Medical Ass'n, E-5.059: *Privacy in the Context of Health Care*, *available at* http://www.ama-assn.org/ama/noindex/category/11760.html 19

American Medical Association, H-5.990: *Policy on Abortion*, *available at* http://www.ama-assn.org/ama/noindex/category/11760.html 2

TABLE OF AUTHORITIES—Continued

Page(s)

American Medical Ass'n, H-60.965: *Confidential Health Services for Adolescents, available at* http://www.ama-assn.org/ama/noindex/category/11760.html 19

American Public Health Association, *Policy Statement 9001: Adolescent Access to Comprehensive, Confidential Reproductive Health Care, reprinted in* 81 Am. J. Pub. Health 241 (Feb. 1991) 24

Ananth, Cande V., et al., *Placental Abruption in the United States, 1979 through 2001: Temporal trends and potential determinants*, 192 Am. J. Obstet. & Gynecol. 191 (20[illegible] 10

Baker, Anna, et al., *Informed Consent, Counseling, and Patient Preparation*, in *A Clinician's Guide to Medical and Surgical Abortion* 35 (Maureen Paul, MD, et al. eds., 1999) 20

CDC, *STD Surveillance 2003: Adolescents and Young Adults* (2003), *available at* http://www.cdc.gov/std/stats/adol.htm 16

Canavan, Timothy, et al., *An Evidence Based Approach to the Evaluation and Treatment of Premature Rupture of Membranes*, 59 Obstet. & Gynecol. Survey 669 (2004) 14

Collaborative Group on Hormonal Factors in Breast Cancer, *Breast Cancer And Abortion: Collaborative Reanalysis of Data From 53 Epidemiological Studies*, 363 The Lancet 1007 (Mar. 27, 2004) 25

Critical Care Obstetrics (Gary A. Dildy III et al. eds., 4th ed. 2004) ..... *passim*

Emergency Medicine (John M. Howell et al. eds., 1998) 9, 10, 27

Emergency Medicine: Concepts and Clinical Practice (Peter Rosen et al. eds., 1998) 9, 10, 11, 14, 17

TABLE OF AUTHORITIES—Continued

Page(s)

English, Abigail & Kenney, Kirsten E., Center for Adolescent Health & the Law, *State Minor Consent Laws: A Summary* (2d ed. 2003) 24

Fathers' Ages: Child Trends, Facts At a Glance (Mar. 2005), *available at* http://www.childtrends.org/files/Facts_2005.pdf 22

Goldstein, Steven R., MD, et al., *Documenting Pregnancy and Gestational Age*, in *A Clinician's Guide to Medical and Surgical Abortion* (Maureen Paul, MD, ed., 1999) 22

Harwood-Nuss' Clinical Practice of Emergency Medicine (Allan Wolfson et al. eds., 4th ed. 2005) ..... *passim*

Henshaw, Stanley K., MD, *Unintended Pregnancy and Abortion: A Public Health Perspective*, in *A Clinician's Guide to Medical and Surgical Abortion* (Maureen Paul, MD, ed., 1999) 21, 22, 24

Henshaw, Stanley K. & Feivelson, Dina J., *Teenage Abortion and Pregnancy Statistics by State, 1996*, 32(6) Family Planning Perspectives 272 (2000) 13

Holder, Angela Roddey, *Legal Issues in Pediatrics and Adolescent Medicine* (Yale 2d ed. 1985) 24

Improving Women's Health: Understanding Depression After Pregnancy (Sept. 29, 2004) (statement of Nada L. Stotland, M.D., M.P.H.), *available at* http://energycommerce.house.gov/108/Hearings/09292004hearing1388/Stotland2227.htm 25

Johnson, L.G., et al., *The Relationship of Placenta Previa and History of Induced Abortion*, 81 Int'l J. Gynec. & Obstet. 191 (2003) 11, 25

Klein, Jonathan D., *Adolescent Pregnancy: Current Trend and Issues*, 116 Pediatrics 281 (2005) 16

Marino, Paul L., *The ICU Book* (1998) 10

TABLE OF AUTHORITIES—Continued

Page(s)

McIntosh, Kathleen, RN, et al., *Routine Aftercare and Contraception*, in *A Clinician's Guide to Medical and Surgical Abortion* (Maureen Paul, MD, ed., 1999) 23

Medical Complications During Pregnancy (Gerard N. Burrow et al. eds., 6th ed. 2004) 10, 16

Menacker, Fay, et al., *Births to 10-14 Year-Old Mothers, 1990-2002: Trends and Health Outcomes*, 53 Nat'l Vital Statistics Report, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_07.pdf 16, 17

Morrissey, James M., et al., *Consent and Confidentiality In the Health Care of Children and Adolescents: A Legal Guide* (The Free Press 1986) 24

Ozalp, Sinan, et al., *Health Risks For Early (≤19) and Late (≥35) Childbearing*, 268 Arch. Gynecolol. Obstet. 172 (2002) 17

Poehlmann, D. Scott, MD & Bruce Ferguson, MD, *Medical Evaluation and Management*, in *A Clinician's Guide to Medical and Surgical Abortion* (Maureen Paul, MD, ed., 1999) 22, 23

Rickert, Vaughn I., et al., *Prevalence and Risk Factors of Chorioamnionitis Among Adolescents*, 92 Obstet. & Gynecol. 254 (1998) 14, 16

Rosovsky, Fay A., *Consent to Treatment: A Practical Guide* (Aspen Pub. 3d ed. 2001) 24

Rowland, Carol J., et al., *Answering Questions About Long-Term Outcomes*, in *A Clinician's Guide to Medical and Surgical Abortion* (Maureen Paul, MD, ed., 1999) 25

Society for Adolescent Medicine, *Confidential Health Care for Adolescents*, 21 J. Adolescent Health 408 (1997) 21

Tillett, Jackie, *Adolescents and Informed Consent*, 19 J. Perinat. Neonat. Nurs. 112 (2005) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Williams Obstetrics (F. Gary Cunningham et al. eds., 21st ed. 2001) ..... *passim*

Yamada, Takashi, et al., *Case Report: Two Cases of Placenta Previa Terminated at 18 Weeks Gestation*, 49 Kobe J. Med. Sci. 51 (2003) 11

Yang, Lee C., et al., *Maternal and Fetal Outcomes of Spontaneous Preterm Premature Rupture of the Membranes*, 104 J. Am. Osteopathic Ass'n 537 (2004) 9

Zetterstrom, Karin, et al., *Maternal Complications in Women with Chronic Hypertension: A Population-Based Cohort Study*, 84 Acta. Ocstet. Gynecol. Scand. 419 (2005) 7

INTERESTS OF *AMICI* [1]

The leading medical and public health associations in the United States submit this brief as *amici curiae* to explain why the failure of the New Hampshire Parental Notification Prior to Abortion Act (the "Act") to provide an exception for medical emergencies significantly jeopardizes minors' health and why the Act interferes with physicians' legal and ethical obligations to protect their patients' health. This brief includes technical information about specific medical conditions to illustrate the threat to adolescent health posed by the Act.

The **American College of Obstetricians and Gynecologists** ("ACOG") is a non-profit educational and professional organization founded in 1951. With more than 45,000 members in the United States, ACOG is the leading professional association of physicians who specialize in the health care of women. ACOG recognizes that the issue of support for or opposition to abortion is a matter of profound moral conviction to its members. ACOG, therefore, respects the need and responsibility of its members to determine their individual positions on abortion based on personal values or beliefs. As an organization, ACOG opposes unnecessary regulations that limit or delay access to medical care, including abortion. Many of ACOG's members treat pregnant minors facing health emergencies.

The **American Medical Association** ("AMA"),[2] an Illinois non-profit corporation, is an association of approxi-

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this *amicus* brief have been submitted to the Clerk.

[2] The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical so-

mately 250,000 physicians, residents, and medical students and is the largest medical society in the United States. Its members practice in every state, including New Hampshire, and in every field of medical specialization. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes.

The **New Hampshire Medical Society** ("NHMS"), a New Hampshire not-for-profit organization incorporated in 1791, represents approximately 2,000 physicians, residents, and medical students within New Hampshire. Its objectives are to promote the science and art of medicine and the betterment of public health within New Hampshire. It seeks to attain these objects by federating and bringing into one compact state organization every physician licensed to practice medicine in the state, by participating in the processes of government at all levels, and by uniting with similar societies as a constituent of the AMA.

Neither the AMA nor the NHMS support or oppose abortion. Both the AMA and the NHMS believe that this issue is a matter for physicians to decide individually, based on personal values and beliefs.[3] The AMA and the NHMS join this brief to support the integrity and confidentiality of the patient/physician relationship and the ethical duty of physicians to respect and advocate for their patients' personal autonomy. They also join this brief because they oppose the imposition of criminal penalties on health care decision-making.

The **American Academy of Pediatrics** ("AAP"), founded in 1930, is a non-profit professional organization of pediatricians, pediatric medical subspecialists, and pediatric

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cieties, including the New Hampshire Medical Society, to represent the views of organized medicine in the courts.

[3] *See* American Medical Association, H-5.990: *Policy on Abortion*, *available at* http://www.ama-assn.org/ama/noindex/category/11760.html. This resolution was adopted by the AMA's House of Delegates, the primary policy-making body of the AMA.

surgical specialists, with more than 60,000 members. Its mission is to attain optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults, including those who are pregnant.

The **New Hampshire Pediatric Society** ("NHPS"), founded in 1957, is a state chapter of the American Academy of Pediatrics. Its membership consists of over 200 physicians from across the state. Like the AAP, NHPS is dedicated to the optimal physical, mental, and social health and well-being of all infants, children, adolescents, and young adults, including those who are pregnant.

The **Society for Adolescent Medicine** ("SAM") is a multi-disciplinary organization composed of health-care professionals who dedicate their lives to the care of adolescents. SAM works to promote public and professional awareness of the health-related needs of adolescents and to promote the health and well-being of all adolescents. Members of SAM treat pregnant minors who face health emergencies.

The **American Psychiatric Association** ("APA"), with approximately 40,000 members, is the nation's leading organization of physicians specializing in psychiatry. The APA has long opposed legal interference with abortion rights and with physicians' exercise of their medical judgment to protect their patients' health.

The **North American Society for Pediatric and Adolescent Gynecology** ("NASPAG") is a non-profit association comprised obstetrician-gynecologists, adolescent medicine specialists and other pediatricians, family practitioners, and nurse practitioners. NASPAG acts as a forum for education, research, and communication among health professionals who provide gynecologic care to children and adolescents.

The **National Medical Association** ("NMA") is the nation's oldest and largest organization representing African-American physicians and health professionals in the United States. Established in 1895, the NMA is the collective voice of more than 25,000 African American physicians and the patients they serve. The NMA promotes the interests of physicians and patients of African descent and carries out

this mission by promoting parity in medicine, elimination of health disparities, and promotion of optimal health.

Founded in 1872, the **American Public Health Association** ("APHA") is the oldest, largest, and most diverse organization of public health professionals in the world. The association works to protect all Americans, their families, and communities from preventable, serious health threats and strives to ensure that community-based health promotion, injury and disease prevention activities, and preventive health services are universally accessible. APHA represents a broad array of health officials, educators, environmentalists, policy-makers, and health providers at all levels, working both within and outside governmental organizations and educational institutions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Notwithstanding the assertions of New Hampshire and many of its *amici*, this case is not about the wisdom of laws requiring mandatory notice to a minor's parent when she seeks an abortion. Whatever one may think about such laws, this case is about an altogether different issue: whether, when such a law exists, it should apply even in situations where the time it takes to comply with its notification requirement, or to seek a court's permission not to do so, will place a young woman's health in grave danger. As the leading medical and public health organizations representing physicians who treat pregnant women in this country, *amici* urge this Court to answer that question in the negative. No law, regardless of its justification, should be permitted to place a patient's health at risk. But this is precisely what New Hampshire's Parental Notification Prior to Abortion Act (the "Act") does.

Contrary to more than thirty years of this Court's precedents declaring that women's health is, and must be, paramount when the government regulates abortion, New Hampshire has passed a statute that places the State's pregnant minors at serious risk. And the State and its *amici* now attempt to insulate that statute from challenge by urg-

ing a standard for judicial review that will effectively deny timely abortions to critically ill minors facing medical emergencies by prohibiting facial challenges to that law. The Court should reject their efforts.

First, the failure to include a medical-emergency exception in the Act jeopardizes the health of New Hampshire minors, some of whom will have conditions that will require immediate abortions to protect their health. For these minors, even the relatively short delay mandated by the Act to notify the minor's parents or seek court relief will have catastrophic health consequences. Parental notice is not necessary to provide safe abortion care to a minor. Also, the Act would force physicians to violate ethical and professional obligations by requiring them to delay critical treatment in a medical emergency.

Second, requiring a specific patient to bring an as-applied challenge to a law lacking a medical-emergency exception will put women at risk. Such challenges provide no meaningful relief to physicians and patients when there is a need for immediate treatment. Statutory medical-emergency exceptions of uniform applicability—not case-by-case relief—are the only adequate means of safeguarding physician judgment and preserving women's health in an emergency context.

Finally, the Act's death exception is inadequate to protect even those pregnant minors who face life-threatening emergencies.

ARGUMENT

I. The Act's Failure To Include an Exception for Medical Emergencies Significantly Jeopardizes Minors' Health

New Hampshire's Parental Notification Prior to Abortion Act (the "Act"), which requires that a minor's parent be notified in writing at least forty-eight hours before an abor-

tion is performed,[4] contains no exception whatsoever for situations in which a pregnant minor faces a medical emergency that requires an immediate abortion to preserve her health, even though the majority of states permit physicians to render care without parental consent in other medical emergencies. This omission places young women at significant risk. The medically indicated treatment for some serious medical conditions that arise during pregnancy—including certain hypertensive disorders, infections, and placental anomalies—may be the prompt termination of the pregnancy. But the Act prohibits New Hampshire physicians from providing that medically indicated treatment. Instead, under threat of criminal penalties, they must delay care until forty-eight hours after providing written notice to the minor's parent or until a court hears and grants the minor's bypass petition. This state of affairs would violate the central tenets of proper obstetrical and emergency health care, conflict with physicians' ethical and professional obligations, and unconscionably endanger minors' health.

A. New Hampshire Minors Will Require Immediate Abortions To Protect Their Health in Circumstances That Would Not Be Covered by the Act's Death Exception

1. Physicians who treat pregnant minors encounter patients who face serious health complications that require immediate abortions

Physicians who treat pregnant women, including pregnant minors, encounter patients with serious health conditions that would not qualify for the Act's death exception. These conditions are nevertheless so severe that immediate termination of the pregnancy will, in some instances, be the

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[4] *See* N.H. Rev. Stat. Ann. § 132:25 (2004) ("No abortion shall be performed upon an unemancipated minor ... until at least 48 hours after written notice of the pending abortion has been delivered ...."). No delay is mandated if a parent certifies that he or she has been notified. *Id.* § 132:26.

medically indicated course of treatment, and the delay mandated by the Act would place the patient at serious risk. Such conditions include:

Hypertensive Disorders of Pregnancy. Pregnancy-induced hypertensive disorders (characterized by a pregnant woman's blood pressure rising above 140/90 mm Hg with or without an occurrence of high blood pressure before pregnancy) remain one of the leading causes of maternal morbidity.[5] Hypertensive diseases occurring during pregnancy include preeclampsia, eclampsia, and HELLP syndrome.[6] These are all grave disorders that often require the immediate termination of the pregnancy to prevent potentially catastrophic health consequences, but may not qualify for the Act's death exception.

Preeclampsia is a clinical hypertensive disorder characterized by high blood pressure, kidney dysfunction, and swelling. (It is the precursor to eclampsia, which is marked by the occurrence of seizures in women with preeclampsia.[7]) Women with severe preeclampsia can face serious deterioration of a number of organs and organ systems.[8] Renal failure, blindness, congestive heart failure, myocardial infarction (heart attack), pulmonary edema (fluid accumulation and swelling in the lungs), rupture of the liver, and stroke are all known maternal health risks associated with severe preeclampsia.[9]

When severe preeclampsia is diagnosed, "immediate delivery, regardless of gestational age" is routinely recom-

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[5] *Harwood-Nuss' Clinical Practice of Emergency Medicine* 508-509 (Allan Wolfson et al. eds., 4th ed. 2005).

[6] *Williams Obstetrics* 568, 579 (F. Gary Cunningham et al. eds., 21st ed. 2001); Karin Zetterstrom et al., *Maternal Complications in Women With Chronic Hypertension: A Population-Based Cohort Study*, 84 Acta. Obstet. Gynecol. Scand. 419, 419-424 (2005).

[7] *Williams Obstetrics* 571.

[8] *Id.* at 573.

[9] *Id.* at 573-585.

mended.[10] Where the fetus is not yet viable, this means abortion.[11] Indeed, delaying termination of the pregnancy is associated with increased maternal morbidity and complications including placental abruption (premature separation of the placenta with excess bleeding), eclampsia, coagulopathy (inability of blood to clot), hypertensive encenphalopathy, renal failure, intracerebral hemorrhage, and ruptured hepatic hematoma (formation of a blood clot in the liver that can rupture into the abdomen causing internal hemorrhage and/or uncontrolled blood loss).[12] Such complications can lead to life long pain and suffering for the woman.

HELLP syndrome, a complication unique to pregnancy-induced hypertension, is characterized by a triad of hemolysis (disintegration of red blood cells), elevated liver enzymes,

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[10] *Critical Care Obstetrics* 438 (Gary A. Dildy III et al. eds., 4th ed. 2004); *see Harwood-Nuss' Clinical Practice of Emergency Medicine* 510 ("In cases where there is evidence of advanced disease or of impending eclampsia, delivery is indicated, regardless of the age of the fetus. In these cases, evacuation of the uterus is the only measure that will halt the advance of the disease.").

[11] Many of the leading obstetrics and emergency medicine texts, in discussing the medically indicated treatment for women facing serious health conditions, refer to the need for "prompt delivery" or "immediate delivery, regardless of gestational age." *See, e.g., Critical Care Obstetrics* 438. The State's *amici* seize on this language to argue that an *abortion* is not indicated in the face of certain medical conditions, but rather that *delivery* of the fetus is the appropriate treatment. *See, e.g.*, Pro-Life Ob/Gyns Br. 14, 16. This is a false distinction. "Delivery" of a fetus before the point of viability (when the fetus can survive outside the woman on its own or with artificial assistance) *is* an abortion. *See Williams Obstetrics* 856 (Abortion is the "termination of pregnancy by any means before the fetus is sufficiently developed to survive."); N.H. Rev. Stat. Ann. § 132:24 (Supp. 2004) ("'Abortion' means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.").

[12] *Critical Care Obstetrics* 438.

and low platelets.[13] HELLP develops in 5% to 20% of women with preeclampsia/eclampsia.[14] Complications associated with HELLP syndrome include placental abruption, acute renal failure, and hepatic hematoma with rupture.[15] The indicated treatment for a patient who develops HELLP in almost all cases is immediate termination of the pregnancy (abortion pre-viability and delivery post-viability), especially if she exhibits uncontrolled blood pressure or signs of changes in liver enzymes (which indicate a deterioration in health).[16] With any of these hypertensive disorders of pregnancy, the mandatory delay required by the Act to notify a minor's parent or obtain a court bypass could seriously endanger and possibly permanently impair the patient's health.

Preterm Premature Rupture of Membranes and Chorioamnionitis. Preterm premature rupture of membranes ("PPROM") is the rupture of the membranes that bathe the fetus at any time prior to 37 weeks gestational age.[17] PPROM can occur early in pregnancy.[18] When such rupture occurs, the risk of developing chorioamnionitis, a serious infection of the placental lining and fluids, increases dramatically.[19] Chorioamnionitis can also occur spontaneously in the absence of PPROM, and can occur when an in-

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[13] *Williams Obstetrics* 579.

[14] *Id.* (noting incidence as high as 20%); *Critical Care Obstetrics* 449 (noting average incidence of 12%); *Emergency Medicine: Concepts and Clinical Practice* 2353 (Peter Rosen et al. eds., 1998) (HELLP develops in 5-10% of women with preeclamptic symptoms).

[15] *Critical Care Obstetrics* 450.

[16] *Id.* at 450-451.

[17] *Harwood-Nuss' Clinical Practice of Emergency Medicine* 517.

[18] Lee C. Yang et al., *Maternal and Fetal Outcomes of Spontaneous Preterm Premature Rupture of Membranes*, 104 J. Am. Osteopathic Ass'n 537, 537-542 (2004).

[19] *Id.*; *Emergency Medicine* 1321 (John M. Howell et al. eds., 1998)

fection results from, for example, amniocentesis (the removal of amniotic fluid, usually for chromosomal testing).[20]

The onset of chorioamnionitis places the patient at serious risk of severe harms that compound on each other, including permanent infertility and sepsis (infection affecting one or more major bodily organs, such as the lungs, liver, kidney, heart, or brain).[21] PPROM with evidence of infection "dictates delivery regardless of gestational age."[22] In cases of PPROM and chorioamnionitis, the mandatory delay imposed by the Act (to effectuate parental notice or obtain a judicial bypass) may seriously jeopardize the patient's health.

Placental Abruption and Placenta Previa. Placental abruption is the complete or partial separation of the placenta from the uterine wall. Maternal risks associated with abruption include massive blood loss requiring red cell transfusion, disseminated intravascular coagulation ("DIC"), and kidney failure;[23] these associated conditions can lead to acute respiratory distress syndrome ("ARDS") and death.[24] Among the most serious immediate complications of placental abruption is DIC. DIC is a disorder associated with a host of serious conditions and results in the inability to form a clot with the consequence of uncontrolled bleeding.[25] The occurrence of DIC increases the ongoing risk of hemorrhage and makes the heavy bleeding more difficult to treat. In-

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[20] *Medical Complications During Pregnancy* 314-315 (Gerard N. Burrow et al. eds., 6th ed. 2004).

[21] *Critical Care Obstetrics* 562-564; Paul L. Marino, *The ICU Book* 503-505 (1998); *see also* Decl. of Wayne Goldner, M.D. ¶ 10.

[22] *Emergency Medicine* 1322; *see also* Pro-Life Ob/Gyns Br. 16 (treatment of chorioamnionitis requires prompt "delivery").

[23] Cande V. Ananth et al., *Placental Abruption in the United States, 1979 through 2001: Temporal Trends and Potential Determinants*, 192 Am. J. of Obstet. & Gynecol. 191, 192 (2005).

[24] *Id.*; *Critical Care Obstetrics* 335.

[25] *Emergency Medicine: Concepts and Clinical Practice* 2377; *Critical Care Obstetrics* 399.

creased bleeding signals an escalating threat to the patient's health. In such circumstances, an emergency abortion may be required before the delay in care that the Act mandates for parental notification or judicial bypass.[26]

Placenta previa exists when the placenta partially or entirely covers the cervical os (opening). As with placental abruption, the gravest risk associated with placenta previa is excessive bleeding.[27] When cases of central or total previa occur, the risk of severe hemorrhage rises and "may become life-threatening in as little as 15 min[utes]."[28] While most cases of placenta previa do not require pregnancy termination, in some cases, severe hemorrhage from placenta previa will necessitate an emergency abortion.[29] For those patients, even a moderate delay in treatment poses serious health risks.

2. The frequency of these conditions is irrelevant both to the constitutional inquiry and to the medical necessity of an emergency exception

Contrary to the State's claims, *see* Pet. Br. 13-16, the relative rarity of these health conditions does not obviate the need for a medical-emergency exception in the Act. This Court has repeatedly noted that a medical condition's infrequency is irrelevant to whether a health exception is necessary in a law regulating abortion—and for good reason. It is

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[26] *Harwood-Nuss' Clinical Practice of Emergency Medicine* 497 (evacuation of uterus may be needed when massive blood loss occurs); *Critical Care Obstetrics* 298-299 (life threatening blood loss can occur with abruption leading to need to expedited delivery).

[27] *Emergency Medicine: Concepts and Clinical Practice* 2352; Takashi Yamada et al., *Case Report: Two Cases of Placenta Previa Terminated at 18 Weeks' Gestation*, 49 Kobe J. Med. Sci. 51, 51-54 (2003).

[28] L.G. Johnson et al., *The Relationship of Placenta Previa and History of Induced Abortion*, 81 Int'l J. Gynec. & Obstet. 191, 191 (2003).

[29] Yamada et al., *supra* note 27, at 51-54; *see also* Pro-Life Ob/Gyns Br. 16 (noting that "delivery" is the appropriate treatment for certain cases of placenta previa).

of no comfort to the pregnant minor facing a medical emergency, or to the physician treating her, that most women have uncomplicated pregnancies and thus would never have to avail themselves of a medical-emergency exception. Thus, in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), this Court acknowledged that "the health exception question is whether protecting women's health requires an exception for those infrequent occasions."[30] The Court continued: "A rarely used treatment might be necessary to treat a rarely occurring disease that could strike anyone—the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it."[31]

Similarly, in *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), this Court held that a medical-emergency exception was required in circumstances that were comparatively rare. There, the Court invalidated a statute that would have required the participation of two physicians in any post-viability abortion because it failed to contain an exception for medical emergencies.[32] Yet it would have been a rare situation indeed in which waiting for a second concurring physician to arrive would have itself posed a health risk to the patient.

By definition, medical-emergency exceptions are intended to address the atypical scenario. This Court has nevertheless regularly required them in statutes that regulate abortion because it has insisted that women's health remain paramount when the state enacts such statutes. *See Planned Parenthood* v. *Casey*, 505 U.S. 833, 880 (1992) ("the

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[30] *Stenberg* v. *Carhart*, 530 U.S. 914, 934 (2000).

[31] *Id.*; *see also Planned Parenthood of Wisconsin* v. *Doyle*, 162 F.3d 463, 469 (7th Cir. 1998) (the fact that the abortion procedure at issue is rare is irrelevant because "[a] woman whose health depends on it will not be comforted to learn that Wisconsin has decided to ban the procedure because only a few women need it and so the state can make a low-cost statement of opposition to abortion rights").

[32] *Thornburgh* v. *American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 771 (1986).

essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health"). The Act violates this core principal by subordinating the health of minors facing certain medical emergencies.

3. These health conditions, even if relatively uncommon, affect substantial numbers of pregnant women, including pregnant minors

There is no real dispute that while these conditions occur with relative infrequency, they afflict substantial numbers of pregnant women, including pregnant minors, each year. Contrary to the State's suggestion, *see* Pet. Br. 13, these emergency health conditions are not merely hypothetical scenarios. Physicians who treat pregnant women, including members of *amici* medical organizations, treat patients facing these health emergencies. In some of these cases, emergency abortions will be the most medically appropriate response.[33]

Indeed, in *Casey*, this Court recognized that both preeclampsia and PPROM occur during pregnancy and that they present the risk of serious injury in some cases when the pregnancy is not terminated.[34] Current statistics bolster these findings:

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[33] The State's *amicus*, the Thomas More Society, attempts to marshal statistics to prove that emergency abortions do not occur. Its analysis is suspect, however, because only six states require reporting of cases in which an exception was relied on to excuse compliance with a parental involvement law. *Cf.* Stanley K. Henshaw & Dina J. Feivelson, *Teenage Abortion and Pregnancy Statistics by State, 1996*, 32(6) Family Planning Perspectives 272, 272-273 (2000) (noting limitations of CDC data on abortion due to incomplete reporting by many states). But even in those six states, thirteen instances were reported in which a physician utilized a medical-emergency exception. *See* Thomas More Soc'y Br. 12-22. Of course, these are not necessarily the only instances in which a minor required an emergency abortion to protect her health in those states.

[34] 505 U.S. at 978.

- Estimates of occurrence of PPROM range from 3% of all pregnancies[35] to 8% of all pregnancies.[36] Clinical chorioamnionitis has been reported in 0.5% to 3.0% of all pregnancies.[37] Thus, chorioamnionitis occurs in approximately 31,500 to 189,000 of the 6.3 million pregnancies in the United States each year, some number of which will be in minors.[38]
- Approximately 6% to 8% of pregnancies are complicated by hypertensive disorder of pregnancy.[39] The incidence of preeclampsia among all women is approximately 5%, or approximately 315,000 pregnancies per year.[40] HELLP syndrome, a variant of severe preeclampsia, affects 12% of patients with preeclampsia, or approximately 37,800 women per year.[41]
- Placental abruption is estimated to occur in approximately 1 in 200 pregnancies, or approximately 31,500 pregnancies per year.[42] Moreover, placental abruption in women with HELLP syndrome is 20 times more likely than in the general obstetric population.[43]

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[35] *Emergency Medicine: Concepts and Clinical Practice* 2375; Timothy Canavan et al., *An Evidence-Based Approach to the Evaluation and Treatment of Premature Rupture of Membranes*, 59 Obstet. & Gynecol. Survey 669, 669 (2004).

[36] *Harwood-Nuss' Clinical Practice of Emergency Medicine* 517.

[37] Vaughn I. Rickert et al., *Prevalence and Risk Factors of Chorioamnionitis Among Adolescents*, 92 Obstet. & Gynecol. 254, 254 (1998).

[38] Alan Guttmacher Institute, *Facts in Brief: Induced Abortion in the United States* (2005) ("Induced Abortion"), *available at* http://www.agi-usa.org/pubs/fb_induced_abortion.html.

[39] *Critical Care Obstetrics* 436.

[40] *Williams Obstetrics* 572.

[41] *Critical Care Obstetrics* 448.

[42] *Williams Obstetrics* 622.

[43] *Critical Care Obstetrics* 450.

- Placenta previa is present in 1 in 200 to 1 in 390 pregnancies.[44]

Minors are not immune from these serious conditions, which affect teens and adult women alike. As the district court below noted, "the parties do not dispute that pregnant minors, subject to the requirements of the Act, could experience complications in their pregnancies that would endanger their health."[45] Indeed, the State's *amici* concede that "potentially catastrophic medical conditions" such as "preeclampsia/eclampsia, premature rupture of the membranes/chorioamnionitis, placenta previa and abruptio placenta" do affect pregnant minors.[46] Moreover, New Hampshire's decision to include a death exception in the Act evinces a recognition that medical complications that would require an immediate abortion can threaten the health and lives of young women, otherwise such an exception would not be necessary.

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[44] *Williams Obstetrics* 631.

[45] 296 F. Supp. 2d 59, 65 n.4 (D.N.H. 2003) (noting that Dr. Wayne Goldner "describ[ed] medical complications which may occur during pregnancy putting pregnant minors at risk and requiring prompt or immediate termination of the pregnancy"); *Planned Parenthood* v. *Owens*, 107 F. Supp. 2d 1271, 1277 (D. Colo. 2000) (noting that some minors "will experience medical conditions during pregnancy that pose serious risks to their health ... [t]hese conditions include preeclampsia [and] premature rupture of membranes ... [s]ome of these conditions require immediate attention to avoid risk of serious health problems or even death. Preeclampsia, for example, calls for immediate action as delay can place the woman at risk for cerebral hemorrhage, liver failure, kidney failure, vision problems and coma. Therefore, when a pregnant minor presents with one of these urgent medical conditions, delaying aggressive treatment in order to give notice pursuant to the Act may place the patient's health at risk in circumstances short of imminent death.") (internal citations omitted); *see also Planned Parenthood* v. *Wasden*, 376 F.3d 908, 926-927 (9th Cir. 2004) (medical conditions such as preeclampsia and HELLP syndrome may necessitate an emergency abortion).

[46] *See* Pro-Life Ob/Gyns Br. 9-17; *see also* Thomas More Soc'y Br. 12-22 (noting that medical emergency abortions have been reported in Alabama, Nebraska, and Wisconsin).

In fact, pregnant minors face an *increased* risk of some specific conditions when compared with adult women.[47] This is due, in part, to the fact that these conditions more often affect women with poor or non-existent prenatal care.[48] Minors, and especially the youngest minors, are the least likely group of women to receive timely, if any, prenatal care.[49] Delayed prenatal care can lead to delayed diagnosis and treatment of conditions complicating pregnancy, and thus higher risks of complications and more advanced disease progression. For example, rates of eclampsia, the most severe form of hypertension in pregnancy, are higher in women who have not received appropriate prenatal treatment.[50]

Minors are also at higher risk for specific emergency medical conditions. For example, minors are more likely to be infected with a sexually transmitted disease, such as chlamydia or gonorrhea, than are adult women.[51] Both gonorrhea and chlamidya are associated with increased risk of PPROM, and thus could lead to chorioamnionitis.[52] Indeed, there is evidence of increased risk of chorioamnionitis among adolescents.[53]

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[47] Jonathan D. Klein et al., *Adolescent Pregnancy: Current Trends and Issues*, 116 Pediatrics 281, 283 (2005). In fact, the mortality rate for young pregnant women is twice that of adult pregnant women. *Id.*

[48] *Id.* at 283.

[49] *See* Fay Menacker et al., *Births to 10-14 Year-Old Mothers, 1990-2002: Trends and Health Outcomes*, 53 Nat'l Vital Stat. Rep. (2004), *available at* http://www.cdc.gov/nchs/births.htm.

[50] *Harwood-Nuss' Clinical Practice of Emergency Medicine* 508.

[51] CDC, *STD Surveillance 2003: Adolescents and Young Adults* (2003), *available at* http://www.cdc.gov/std/stats/adol.htm; Alan Guttmacher Institute, *Facts in Brief: Teen Sex and Pregnancy* (1999), *available at* http://www.agi-usa.org/pubs/fb_teen_sex.html.

[52] *Medical Complications During Pregnancy* 319-321; *ACOG Practice Bulletin: Premature Rupture of Membranes* (1998).

[53] Rickert et al., *supra* note 37, at 254-257.

Women at the extreme ends of the reproductive age spectrum—and thus, minors—are also most susceptible to pregnancy associated hypertension.[54] The risk of pregnancy-induced hypertension is greatest in women younger than 20;[55] in fact, rates of pregnancy-associated hypertension for the youngest teens is more than 40% higher than rates among older women.[56] Preeclampsia is primarily a disorder of first pregnancies;[57] it is thus especially prevalent among women under the age of 19.[58]

These statistics demonstrate that, far from being hypothetical, these health emergencies can occur with reasonable frequency in all women, including, and in some cases especially, in adolescents.[59] Their relative infrequency does nothing to diminish the need to treat them appropriately when they do occur.

B. The Act's Judicial Bypass Mechanism Is Insufficient To Protect Minors Who Need Emergency Abortions To Protect Their Health

Contrary to New Hampshire's assertions, the Act's judicial bypass option does not negate the need for a health exception, as it does not address situations in which a minor needs emergency medical care before a bypass can be granted. Even very short delays can be catastrophic in a

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[54] *Williams Obstetrics* 572.

[55] *Emergency Medicine: Concepts and Clinical Practice* 2353.

[56] *See* Menacker et al., *supra* note 49.

[57] *ACOG Practice Bulletin: Diagnosis and Management of Preeclampsia and Eclampsia* 2 (2002).

[58] Sinan Ozalp et al., *Health Risks For Early (≤19) and Late (≥35) Childbearing*, 268 Arch. Gynecolol. Obstet. 172, 172-174 (2002).

[59] Minnesota claims that Minnesota teens have not suffered harm despite that state's lack of a medical-emergency exception in its parental involvement law. Minn. Br. 9. The statistics it cites to support this proposition, however, address only complications that occurred during abortion procedures (*see id.* App. 1), which demonstrate nothing about minors whose health may have been compromised by a delay in abortion care necessitated by compliance with the state's parental notice requirement.

medical emergency. Some complications resulting from emergency conditions can be minimized by aggressive, early intervention to terminate the pregnancy. Conversely, even a short delay in diagnosis and effective treatment in certain circumstances can lead to increased rates of maternal morbidity. For example, delay in the treatment of chorioamnionitis can lead to widespread infection, including septic shock, and an increased risk of placental abruption.[60] Likewise, even apparently mild preeclampsia can rapidly progress to the most severe forms of pregnancy-induced hypertension. When preeclampsia is severe, delaying termination of the pregnancy—even for the time necessary to obtain a court order—can be calamitous, causing placental abruption, eclampsia, renal failure, hemorrhage, and stroke.[61]

Moreover, because medical conditions are inherently unpredictable and change frequently, it is impossible to forecast with certainty when a serious health condition will rise to the level of a catastrophic condition.[62] A minor's condition can rapidly deteriorate; in the face of such decline, physicians must have the ability to act quickly to protect their patient's health.[63] The judicial bypass process, even if operated with dispatch, simply will not be fast enough in some cases.

New Hampshire is simply wrong when it suggests that courts are the routine forum for determining treatment options in a medical emergency. *See* Pet. Br. 22 & n.4. Courts

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[60] *Critical Care Obstetrics* 298, 562-564.

[61] *Williams Obstetrics* 594, 623-624; *Critical Care Obstetrics* 437; Zetterstrom et al., *supra* note 6, at 419-424.

[62] *See* 390 F.3d 53, 63 (1st Cir. 2004) ("[P]hysicians cannot predict with adequate precision what course medical complications will take, and thus cannot always determine whether death will occur within this time window."); *Critical Care Obstetrics* 3.

[63] *Critical Care Obstetrics* 3 ("[I]t may be helpful to consider critical illness as impending, developing, or established significant organ dysfunction, which may lead to long-term morbidity or death. This allows some flexibility in the characterization of disease severity since it recognizes conditions that can deteriorate rather quickly in pregnancy.").

rarely became involved in medical decision-making; the examples provided by the State, such as blood transfusion of Jehovah's Witness, are the exception, not the rule. Successful outcomes depend in many cases on physicians' ability to act immediately in a medical emergency.

C. The Act Imposes Inappropriate Ethical and Practical Burdens on Physicians

The Act places physicians at odds with their professional obligations to their patients. It violates basic principles of medical ethics to require a doctor to "wait and see" if a minor patient's condition deteriorates into a life-threatening situation before permitting that doctor to provide medically indicated treatment. Yet this is precisely what the Act demands. It exposes physicians to criminal and civil penalties for meeting their ethical and professional obligations to treat patients according to their best medical judgment in emergent situations. It also deprives patients of their fundamental right to optimal, confidential medical care without governmental interference.[64]

The Act imposes a practical burden on physicians in addition to this ethical dilemma. Physicians are subject to criminal penalties and civil liability under the Act if they fail to comply with the Act's notice requirements despite the existence of a medical emergency. *See* N.H. Rev. Stat. Ann. § 132:27. Yet, if they fail to treat a patient in a medical emergency, they may also be subject to civil liability for negligence. The Act thus places physicians in an untenable position, caught between competing legal mandates.

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[64] *See* American Medical Association, H-60.965: *Confidential Health Services for Adolescents* and E-5.059, *Privacy in the Context of Health Care* ("Physicians must seek to protect patient privacy in all of its forms[.]"), *available at* http://www.ama-assn.org/ama/noindex/category/11760.html; *see also* AAP Committee on Adolescence, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 Pediatrics 746 (May 1996); American College of Obstetricians & Gynecologists, *ACOG Statement of Policy: Access to Reproductive Health Care for Adolescents* (July 2000).

II. A MEDICAL-EMERGENCY EXCEPTION WILL PROTECT, NOT ENDANGER, YOUNG WOMEN'S HEALTH

A. A Medical-Emergency Exception Will Not Prevent Physicians From Involving a Minor's Parent Where Appropriate

In the absence of parental notification or consent laws, the majority of pregnant teens involve one or both parents in their decision about whether to have an abortion or continue an unintended pregnancy.[65] Physicians or clinic staff frequently offer to act as an intermediary for a minor who is reluctant to tell her parents that she is pregnant.[66] The existence of a medical-emergency exception in a law mandating parental involvement does not prevent a physician from contacting a parent in a health emergency if the circumstances permit. Rather, a medical-emergency exception merely provides physicians with a mechanism to treat critically ill patients with necessary speed where the delay in notifying a parent, or obtaining a court order, will itself endanger the patient's health.

B. Parental Involvement Is Not Necessary To Provide Safe Abortion Care to a Minor, Even in a Medical Emergency

Parental involvement is not a necessary requirement for safe abortion care. In fact, physicians regularly provide safe abortion care to minors without parental involvement. Mi-

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[65] Studies have found that the vast majority of teens having an abortion do so with the knowledge of at least one parent. *See* Alan Guttmacher Institute, *Induced Abortion*, *supra* note 38 (61% of minors having an abortion do so with the knowledge of at least one parent); AAP Committee on Adolescence, *supra* note 64, at 747 (90% of adolescents 14 years old or younger and 74% of adolescents 16 years old or younger had an abortion with the knowledge of at least one parent).

[66] Indeed, "a discussion about involving [a teen's] parent or guardian in the abortion decision" is part of the typical abortion provider's informed consent process. Anna Baker et al., *Informed Consent, Counseling, and Patient Preparation*, in *A Clinician's Guide to Medical and Surgical Abortion* 35 (Maureen Paul, MD, et al. eds., 1999) ("*Clinician's Guide*").

nors are capable of providing meaningful, informed consent to medical care, including abortion.[67] And, in approximately one-third of states (including New Hampshire until now), pregnant minors may consent to abortion care without parental involvement.[68] No evidence indicates that lack of parental involvement endangers minors' health; if anything, studies show that parental involvement laws may place teenagers at risk by causing them to delay their abortions.[69]

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[67] Nancy E. Adler et al., *Abortion Among Adolescents*, Am. Psychol. 211, 213-214 (Mar. 2003). In implicit recognition of minors' capacity to make reproductive healthcare decisions, leading medical and public health groups (including *amici* AMA, AAP, ACOG, APHA, and SAM) have adopted policies supporting a minor's right to confidential access to health services, including abortion, without state-mandated parental involvement. *See supra* note 64; American Public Health Ass'n, *Policy Statement 9001: Adolescent Access to Comprehensive, Confidential Reproductive Health Care, reprinted in* 81 Am. J. Pub. Health 241 (Feb. 1991); Society for Adolescent Medicine, *Confidential Health Care for Adolescents*, 21 J. Adolescent Health 408 (1997).

[68] Connecticut, Hawaii, New York, Oregon, Vermont, Washington and the District of Columbia have not enacted parental involvement laws. The laws in Alaska, California, Idaho, Illinois, Montana, Nevada, New Hampshire, New Jersey, and New Mexico are currently enjoined and thus not enforced. *See* Alan Guttmacher Institute, *State Policies in Brief: Parental Involvement in Minors' Abortions* (Sept. 23, 2005), *available at* http://www.agi-usa.org/statecenter/spibs/spib_PIMA.pdf.

[69] *See* Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective*, in *Clinician's Guide* 18.

Several of the State's *amici*'s claims regarding the alleged benefits of parental involvement laws are based on a misuse of statistical data. For example, while *amici* Minnesota and North Dakota cite low teen pregnancy rates in their states (*see* Minn. Br. 7-9), New Hampshire, which has never had such a law, ranks 48th out of the 50 states in teen pregnancy rate, virtually indistinguishable from Minnesota (47) and North Dakota (50) and far lower than Mississippi, which ranks third in the nation and has a law requiring consent of both parents prior to a minor's abortion. *See* Alan Guttmacher Institute, *U.S. Teen Pregnancy Statistics: Overall Trends, Trends by Race and Ethnicity, And State-by-State Information* 8-11 (Feb. 19, 2004), *available at* http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf. Similarly, Minnesota cherry picks three states (Minnesota, North Dakota, and California) to support its claim that parental involvement laws decrease the rate of minors who become preg-

Abortion is safe and relatively straightforward from a medical perspective. Abortion has an extremely low complication rate (complications requiring hospitalization result in 0.27% or fewer of cases).[70] The risk of death due to complications from pregnancy or childbirth is ten times greater than the risk of fatality from an abortion.[71]

The absence of parental involvement does not make abortion less safe. "The medical evaluation of a woman seeking abortion is seldom complicated," and the teen is able to provide information needed for an adequate medical history.[72] The most salient fact for a safe abortion is accurate knowledge of the date of the teen's last menstrual period, which is more likely to be known to the teen than to her parent, and is, in any event, almost never known *only* to her parent. The physician or clinic is also able to verify that date independently with various methods such as a pelvic examination, clinical sizing of the uterus, or by ultrasonography.[73]

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nant by older men. *See* Minn. Br. 5-6. But three other states could be chosen to prove the opposite. For example, New Hampshire's rate of teen mothers with a partner four or more years older (34%) is slightly lower than Mississippi's (35%) or Rhode Island's (40%), two states with mandatory parental involvement laws. And, a comparison of all states shows that there is no substantive difference between the percentage of births to minors where the father was four or more years older in states with parental involvement laws and states without such laws. *See Fathers' Ages: Child Trends, Facts At a Glance* (Mar. 2005), *available at* http://www.childtrends.org/files/Facts_2005.pdf.

[70] Studies indicate that serious complications from a surgical abortion, requiring hospitalization, occur in anywhere from 0.07% of patients (study of 170,000 first-trimester abortions performed between 1971 and 1987) to 0.08% (information maintained by the National Abortion Federation ("NAF") of 240,000 abortions performed at all gestational ages) to .27% (NAF information on approximately 72,000 abortions where patient follow-up was reported). *See* Henshaw, *supra* note 69, at 20.

[71] *See id.*

[72] D. Scott Poehlmann, MD & Bruce Ferguson, MD, *Medical Evaluation and Management*, in *Clinician's Guide* 53.

[73] *See* Steven R. Goldstein, MD, et al., *Documenting Pregnancy and Gestational Age*, in *Clinician's Guide* 41.

Other relevant medical facts for abortion care—current health and previous health problems, history of sexually transmitted diseases (STDs), and recent or current substance abuse—are types of information that a minor is likely to know but may not have disclosed to a parent.[74]

Similarly, follow-up care for an abortion generally does not require parental involvement. Patients "may return to their normal daily activities when they feel ready . . . generally within hours or 1-2 days following a first trimester abortion."[75] Patients are also briefed on the warning signs for complications (heavy bleeding, fever, or persistent pain), all of which will be evident to the patient but not necessarily to her parents—even if informed about the abortion.[76]

The existence of a medical-emergency exception also does not prevent a physician from notifying a parent after the fact if the minor's specific circumstances make parental involvement in follow-up care critical to the minor's recovery. A statute that imposes a mandatory delay in treatment in a health emergency so that a parent can be notified in advance is not an appropriate way to meet the altogether different goal of parental involvement in follow-up care.[77]

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[74] *See* Poehlmann, *supra* note 72, at 53. In fact, the State and its *amici* are unable to provide any sound examples of information relevant to abortion care that would be known to a parent but not to the minor. Their one possibly relevant example is that a minor may not be aware that her mother has had breast cancer, *see* Eagle Forum Br. 3, but the abortion-breast cancer link has been thoroughly discredited. *See infra* note 81.

[75] Kathleen M. McIntosh, RN, et al., *Routine Aftercare and Contraception*, in *Clinician's Guide* 188.

[76] For examples, patients are told to contact the provider if they experience heavy bleeding, described in layperson's terms as "twice the normal menstrual flow." *Id.* A teen will be able to evaluate whether her bleeding is excessive under this standard, which is calibrated to her personal experience, but her parents would not.

[77] New Hampshire advocates for use of the judicial bypass mechanism in a medical emergency. But this, too, leaves the minor without parental involvement in follow-up care.

The State's argument that parental involvement is necessary in a medical emergency in the abortion context is inconsistent with the fact that doctors routinely treat minors without parental involvement in other emergency contexts.[78] Thus, in New Hampshire, and throughout the country, doctors routinely provide a wide range of medical services—including surgery and other medical procedures with similar or greater risks than abortion—to minors without prior parental involvement in emergency situations.

C. The Evidence Belies Any Serious Long-Term Health Consequences of Abortion for Minors

Contrary to the claims of the State and its *amici*, there is simply no reliable evidence that abortions are harmful to minors' health. Extensive reviews have concluded that there are no documented negative psychological or medical sequelae to abortion among teen-aged women.[79] Minors who obtain an abortion are not at greater risk of complications in future pregnancies,[80] future medical problems,[81] or future psychological problems.[82]

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[78] *See* James M. Morrissey et al., *Consent and Confidentiality In the Health Care of Children and Adolescents: A Legal Guide* 50-51, 53 (The Free Press 1986); Fay A. Rosovsky, *Consent to Treatment: A Practical Guide* § 5.2.1 (Aspen Pub. 3d ed. 2001); Angela Roddey Holder, *Legal Issues in Pediatrics and Adolescent Medicine* 125-126 (Yale Univ. Press 1985); Abigail English & Kirsten E. Kenney, Center for Adolescent Health & the Law, *State Minor Consent Laws: A Summary* iv (2d ed. 2003).

[79] AAP Committee on Adolescence, *supra* note 64, at 748 (discussing first-trimester abortions, which account for more than 90% of U.S. abortions). Overall "data do not suggest that legal minors are at heightened risk of serious adverse psychological responses compared with adult abortion patients or with peers who have not undergone abortion." Adler et al., *supra* note 67, at 213.

[80] There is no evidence of complications in future pregnancies among women who have had a first-trimester vacuum aspiration abortion, the most common procedure. *See Induced Abortion*, *supra* note 38, at 2; Henshaw, *supra* note 69, at 20 ("A review of all studies that met basic criteria for methodological adequacy found no statistically detectable effect of first trimester suction abortion on secondary infertility, ectopic pregnancy,

midtrimester spontaneous abortion, prematurity, or low birth weight."). Several *amici* claim that induced abortion increases the risk of placenta previa in future pregnancies, but rely on "[p]ast studies [that] did not take into account the method of abortion[.]" Johnson, *supra* note 28, at 196. Women who have multiple abortions by the nearly obsolete sharp curettage method may have a slightly increased risk of placenta previa, but there is no risk associated with the vacuum aspiration or D&E methods that are currently used. *Id.* at 196-197.

[81] The only medical risk cited by the State's *amici* is the alleged risk of breast cancer, a risk that even they admit is "disputed." *See* U.S. Conf. Catholic Bishops Br. 18. The claim that abortion increases the risk of breast cancer has, in fact, been thoroughly debunked. *See* Carol J. Rowland et al., *Answering Questions About Long-Term Outcomes*, in *Clinician's Guide* 221-222 (discussing studies on the purported abortion-breast cancer linkage, including a study of 1.5 million finding "no overall increased risk of breast cancer . . . demonstrated among women with a history of induced abortion."); Collaborative Group on Hormonal Factors in Breast Cancer, *Breast Cancer And Abortion: Collaborative Reanalysis of Data From 53 Epidemiological Studies*, 363 The Lancet 1007, 1014 (Mar. 27, 2004) ("Hence, the totality of the worldwide epidemiological evidence indicates that pregnancies ending as either spontaneous or induced abortions do not have adverse effects on women's subsequent risk of developing breast cancer.").

Other *amici* claim that, because "early" childbirth reduces the risk of breast cancer, a teenager who has an abortion misses out on this "protective effect." *See, e.g.*, Alaska Br. 9, n.11; Ass'n of Am. Physicians & Surgeons Br. 12; Eagle Forum Br. 14. But "early" childbirth is defined as birth of a first child before the age of 25, and with risk of breast cancer rising only for women who first give birth after age 30. *See* G. Albrektsen et al., *Breast Cancer Risk by Age at Birth, Time Since Birth and Time Intervals Between Births: Exploring Interaction Effects*, 92 Br. J. Cancer 167, 169 (2005). It hardly makes sense to suggest that preventing minors from obtaining abortions is the best way to obtain a protective effect that occurs up to age 30.

[82] *Amicus* APA has concluded after careful study that there are no mental health syndromes linked to abortion. *Improving Women's Health: Understanding Depression After Pregnancy* (Sept. 29, 2004) (statement of Nada L. Stotland, M.D., M.P.H.), *available at* http://energycommerce.house.gov/108/Hearings/09292004hearing1388/Stotland2227.htm; *see also* Rowland, *supra* note 81, at 223 ("[T]here is no convincing evidence of significant negative psychological sequelae from induced abortion."). The lack of negative mental health effects associated with the decision to have an abortion holds true for adolescents. *See* Adler et al., *supra* note 67, at 212 ("Well-designed studies of psychological studies following abortion

III. Statutory Medical-Emergency Exceptions Are Not Used Inappropriately or Abused

Given the inability to dispute that there is a medical need for emergency abortions in certain circumstances, the objection raised by several of New Hampshire's *amici* to a medical-emergency exception in the Act appears to amount to a concern that it would serve as a loophole to allow physicians to avoid notifying parents in any situation. N.H. Legislators Br. 24-25. But there is simply no evidence that physicians would operate in this manner, nor any basis for suggesting that physicians cannot be trusted to follow the law. Indeed, the statistics marshaled by the State's *amici* give lie to the claim that statutory medical-emergency exceptions are massive loopholes used by physicians to evade legal requirements.[83]

IV. Adopting the *Salerno* Standard in the Context of Medical Emergencies Would Endanger Minors' Health

A. An "As-Applied" Challenge Offers No Meaningful Relief in the Context of a Medical Emergency

Were the standard for facial challenges articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), to govern here, as New Hampshire and its *amici* urge, minors' health would be compromised. In practice, application of the *Salerno* rule—under which a statute must be upheld unless there is "no set of circumstances" in which it could be applied constitutionally—would mean that virtually any abortion regulation, including the Act, would survive a facial challenge. *Salerno* would thus effectively leave as-applied

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have consistently shown that risk of psychological harm is also low," with "postabortion rates of distress and dysfunction . . . lower than preabortion rates."); Jackie Tillett, *Adolescents and Informed Consent*, 19 J. Perinat. Neonat. Nurs. 112, 114 (2005).

[83] *See* Thomas More Society Br. 12-22 (in the six states that require reporting of abortions which relied on an emergency exception, only thirteen such abortions occurred).

challenges as the only means of attacking constitutionally infirm abortion restrictions like the Act. But such challenges offer no meaningful relief in the context of a medical emergency.

When pregnant minors face the serious conditions described above, *see supra* pp. 6-11, time is of the essence. Just as the Act's judicial bypass mechanism is inherently too slow to deal with these critical health emergencies, so too is an as-applied legal challenge. In cases of chorioamnionitis, preeclampsia, HELLP, or severe bleeding from placental abruption or previa, even short delays in treatment can be catastrophic.[84] Physicians treating patients with these conditions often must make medical decisions in a matter of hours. The time required to mount an as-applied challenge and to obtain judicial relief will cost a patient critical time in a medical emergency.[85]

B. Adopting the *Salerno* Standard Would Chill Physicians' Willingness To Perform Abortions

Because as-applied challenges are not a meaningful alternative to a medical-emergency exception, were facial challenges to be precluded, the Act would place physicians and their patients in an untenable situation with grave consequences for young women's health. Without the protection of a medical-emergency exception, physicians will be forced to place themselves in legal jeopardy to provide appropriate care to their patients in the hope that an after-the-fact assessment by a court will conclude that the law was unconstitutional as applied to that case. But doctors should not be required to compromise their best medical judgment

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[84] *Critical Care Obstetrics* 298-299, 438, 562-564; *Emergency Medicine* 1322.

[85] The United States appears to concede that a pre-enforcement as-applied challenge would likely not be resolved in time to provide comfort to a physician or patient in a medical emergency. It suggests that, given the exceptions to mootness rules, the suit could proceed "even after the woman had an abortion" (U.S. Br. 16), acknowledging that such challenges do not offer timely relief.

out of concern for their own freedom. The specter of criminal liability will have a profound chilling effect on physicians' willingness to perform abortions even in circumstances where the legislation cannot constitutionally apply. *See Colautti* v. *Franklin*, 439 U.S. 379, 396 (1979) (recognizing the potential for a "profound chilling effect on the willingness of physicians to perform abortions . . . in the manner indicated by their best medical judgment").

The United States and New Hampshire incorrectly argue that as-applied challenges offer all the relief that is needed to avoid the detrimental health consequences posed by a statute that is unassailable through facial challenges. *See* U.S. Br. 14; Pet. Br. 41. Not only are these arguments fundamentally flawed, but the proposed solutions compromise the very principles that the United States and New Hampshire purport to advance.

In suggesting that as-applied challenges offer sufficient relief, the United States assumes that the relief sought in one challenge would have some impact on future cases, via *stare decisis* or otherwise. But *stare decisis* cannot be expected to overcome the chilling effect on physicians, as the very nature of an as-applied challenge, even if it occurs prior to enforcement of the act, limits the holding to the circumstances of the particular case. Doctors will likely not know the details of each adjudicated challenge and, even if they did, medical conditions are too variable and each patient's health circumstances too unique for a decision in one case to offer a clear directive to doctors in the next. Given this uncertainty, a prior case would not help overcome the specter of liability posed by the Act and thus would not comfort physicians treating critically ill patients.

The United States mentions class actions to suggest that broader relief is somehow available, but it entirely fails to spell out how a class action would work and how it would offer the necessary relief to preserve women's health. *See* U.S. Br. 15. It is not surprising that the United States fails to provide these details given the inherent difficulties in relying on class actions in these circumstances. Class actions

present the same problem of delay in time-sensitive medical emergencies as do as-applied challenges. But even if a class could be certified, physicians would not have the requisite certainty that their patients would qualify for class membership to provide them with legal assurance in a medical emergency.

Perhaps most importantly, both *stare decisis* and class relief fail to serve the very interests that the United States and New Hampshire purport to advance. If a class action, or *stare decisis* generally, is to be broad enough to provide physicians and patients with sufficient clarity for future cases then these approaches are no more limited or concrete than the facial challenge that New Hampshire and its *amici* decry. Yet if such relief is crafted narrowly, it will provide no protection for physicians treating patients in future medical emergencies.

V. The Act's Death Exception Is Insufficient To Protect Minor's Health

The exception provided in the Act for situations that threaten a minor's life is unconstitutionally and unconscionably narrow. The Act permits a doctor to perform a life-saving abortion on a minor without delay only if the doctor *certifies in writing* that an "abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." N.H. Rev. Stat. Ann. § 132:26.I(a). The exception is thus limited to conditions that are *certain* to cause a minor's death within the forty-eight hours the Act mandates for parental notice. It does not cover conditions that the doctor believes are likely to cause death, conditions that are possibly—but not definitely—fatal, or conditions that are certain to cause death, but may not do so within forty-eight hours.

These limitations betray a misunderstanding of how medicine is practiced. Doctors cannot predict what course medical complications will take in a given emergency situation with precision. They will rarely be able to certify in writing that a patient will die in less than forty-eight hours

absent an abortion, yet an abortion is no less necessary in these circumstances to preserve the patient's life or health.

Moreover, as the First Circuit correctly concluded, the Act's death exception "fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk against criminal and civil liability." 390 F.3d at 64. There is nothing in the Act or New Hampshire law that would prevent a physician from being prosecuted or sued on the grounds that a particular abortion procedure he or she certified and performed was not "necessary" under the circumstances. Moreover, a doctor cannot know whether his or her certification will be judged according to a standard that simply evaluates whether he or she acted in good faith based on his or her own best medical judgment or according to an objective standard that allows judges and juries to second-guess the reasonableness of that judgment.[86] This threat of criminal prosecution and civil liability will significantly hamper doctors treating minors who need life-saving abortions. It thus puts minors' lives at risk.

CONCLUSION

For the foregoing reasons, and those stated in the briefs of Respondent and its other *amici*, the decision of the Court of Appeals should be affirmed.

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[86] Contrary to the assertion that a doctor is immune from liability if he or she acts in good faith on his or her subjective professional opinion (*see* U.S. Br. 29), there is a real possibility that a doctor's determination would be evaluated under an objective standard. *See* 390 F.3d at 63-64. Under New Hampshire law, a person is guilty of a misdemeanor only if he acts "purposely, knowingly, recklessly, or negligently" with respect to each element of the offense. N.H. Rev. Stat. Ann. § 626:2.I. The definition of negligence imposes an objective standard of reasonableness. *See id.* § 626:2.II(d).

Respectfully submitted.

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In the Supreme Court of the United States

KELLY A. AYOTTE,
ATTORNEY GENERAL OF NEW HAMPSHIRE, *et al.*
Petitioners,

v.

PLANNED PARENTHOOD
OF NORTHERN NEW ENGLAND, *et al.*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICI CURIAE FOR THE CENTER FOR ADOLESCENT HEALTH & THE LAW; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, NEW HAMPSHIRE CHAPTER; AND SIX OTHER ORGANIZATIONS SUPPORTING RESPONDENTS

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Minn. Stat. Ann. § 144.344 (2005) 4

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N.H. Rev. Stat. Ann. § 507-E:2 (2005) 5

N.H. Rev. Stat. Ann. § 627:6 (2005) 5

OTHER AUTHORITIES

Abigail English & Kirsten E. Kenney, Center for Adolescent Health & the Law, *State Minor Consent Laws A Summary* (2d ed. 2003) 4

Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, The New York Times, September 4, 2005, *available at* http://www.nytimes.com/2005/09/05/national/04recuse.html?oref=login&pagewanted=print 19

American Academy of Pediatrics, Committee on Pediatric Emergency Medicine, *Policy Statement: Consent for Emergency Services for Children and Adolescents* (Mar. 2003), ttp://aappolicy.aappublications.org/cgi/content/full/pediatrics;111/3/703 7

American Academy of Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 Pediatrics 756 (1996) 13

Angela Roddey Holder, *Legal Issues in Pediatrics and Adolescent Medicine* (1985) 3

Diane Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA 710 (2002) 13

Fay A. Rosovsky, *Consent to Treatment: A Practical Guide* (3d ed. 2001) 3, 4

Helena Silverstein & Leanne Speitel, *Honey, I Have No Idea: Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 Iowa L. Rev. 75 (2002).....16, 17, 18

Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 Law & Soc. Inquiry 73 (1999).....16. 18, 19

James M. Morrissey, et al., *Consent and Confidentiality In the Health Care of Children and Adolescents: A Legal Guide* (1986)..... 3, 6, 7

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New Hampshire District Court, *Domestic Violence Case Protocols*, Ch.3 http://www.courts.state.nh.us/district/protocols/dv/index.htm 15, 16

New Hampshire District Court Improvement Project, in Cooperation With the Family Division and N.H. Probate Court, *Protocols Relative to Abuse & Neglect Cases and Permanency Planning*, Ch. 3 (Apr. 2003), http:/www.courts.state.nh.us/district/protocols/abuseneglectprotocal.htm 15

New Hampshire Bar Ass'n, *Domestic Violence: It Helps To Know The Law* (May 2000), http://www.nhbar.org/for-the-public/domestic-violence-it-helps-to-know-the-law.asp 15

New Hampshire Judicial Branch, *2005 Court Holidays*,http://www.courts.state.nh.us/sitewidelinks/court_holidays.htm 13

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Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 Law & Soc. Inquiry 73 (1999) 18, 20, 21

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are a number of organizations that, among other things, advocate to ensure that minors have effective access to health care, including reproductive health care. *Amici* include the Center for Adolescent Health & the Law; the National Association of Social Workers; the National Association of Social Workers, New Hampshire Chapter; the National Center for Youth Law; Jane's Due Process, Inc.; the Judicial Consent for Minors Lawyer Referral Panel; the Juvenile Law Center; the Women's Bar Association of Massachusetts; and the Women's Law Project. *Amici* share an interest in ensuring that young women's ability to obtain immediate health care in emergency situations, including emergency situations involving abortion procedures, is not compromised.

SUMMARY OF ARGUMENT

As a matter of established law and accepted medical practice, doctors may treat patients in medical emergencies without parental consent, if danger to the minor's health or life requires immediate action and the minor's parents or guardian are not available. Doctors may and do act quickly to provide necessary emergency treatment, without first going to court for permission, in a wide variety of contexts. There are good reasons for this rule: It ensures that doctors give patients the medical care they need in emergencies without fear of liability

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1 Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

and without the delay inherent in a requirement that doctors seek court permission.

New Hampshire's Parental Notification Prior to Abortion Act (the "Act") creates an unwarranted and unwise exception to this general rule, subjecting doctors to criminal liability if they perform emergency abortion procedures necessary to preserve young women's health without sending notice to the young woman's parents and waiting 48 hours. The State, however, contends the Act "adequately protects the health" of young women notwithstanding the lack of a health exception, because, it argues, young women and their doctors can use the Act's judicial bypass procedures to go to court and get judicial permission for a necessary emergency abortion. Implicitly recognizing, moreover, that any delay caused by a requirement for judicial permission will threaten young women's health, the State asserts that young women and their doctors will be able to get a court hearing *immediately* in emergency situations. Pet. Br. at 22.

The State's contention that the Act's judicial bypass procedure effectively protects young women's health in medical emergency situations is not accurate. To the contrary, requiring young women facing health-threatening medical emergencies to go to court will inevitably add delay, and thus increase the threat to young women's health. *See* J.A. 23-26; Brief of American College of Obstetricians and Gynecologists, *et al.*, as *Amici Curiae*. Requiring a young woman and her doctor facing such a medical emergency to learn about the bypass procedure, locate a judge, schedule a hearing, familiarize the court with the details of the minor's medical condition and the potential risks to her health, and convince the court of the necessity for an immediate abortion will inevitably delay necessary emergency treatment.

Moreover, even if the nature of the judicial process itself did not create delay, there is no assurance that minors and their doctors would have the kind of *immediate* access to courts in emergency situations that even the State concedes is necessary to protect women's health. The available evidence is to the contrary. New Hampshire courts do not appear to assure that young women and their doctors will have the ability to obtain an immediate hearing and decision – particularly when medical emergencies occur, as they inevitably will, after courts are closed or on weekends or holidays. Moreover, experience in other states has demonstrated that judicial bypass procedures often are not easily accessible to minors. That difficulty is troubling even outside the health emergency context, but could lead to immediate and serious physical consequences in a medical emergency. For all these reasons, the Court should reject New Hampshire's invitation to substitute the judicial bypass for a statutory emergency exception, and affirm the First Circuit's decision.

ARGUMENT

I. New Hampshire Would Unwisely Exempt Necessary Emergency Abortion Procedures From Established Law Permitting Doctors To Act Immediately in Medical Emergencies.

Generally, when a minor faces an immediate threat to her health or life, a physician who cannot reach a parent may nonetheless provide the care necessary to address that emergency. The doctor is *not* required to go to court first to get judicial permission before acting.[2]

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[2] James M. Morrissey, et al., *Consent and Confidentiality In the Health Care of Children and Adolescents: A Legal Guide* 50-51, 53 (1986); Fay A. Rosovsky, *Consent to Treatment: A Practical Guide* § 5.2.1 (3d ed. 2001); Angela Roddey Holder,

In the vast majority of states, that rule is established by statute.[3] In others, a common-law doctrine called "implied consent" leads to the same result.[4] New Hampshire law also permits doctors to act immediately to address emergency situations, and

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Legal Issues in Pediatrics and Adolescent Medicine 125-26 (1985); Abigail English & Kirsten E. Kenney, Center for Adolescent Health & the Law, *State Minor Consent Laws: A Summary* at iv (2d ed. 2003).

[3] English & Kenney, *supra* note 2, at iv, *passim*. *See, e.g.*, Md. Code Ann., Health-Gen. § 5-607 (2005) (provider may treat patient incapable of informed consent if treatment of an emergency nature, person authorized to give consent is not available, and doctor determines there is a substantial risk of death or immediate and serious harm to the patient and that the life or health of the patient would be affected adversely by delaying treatment to obtain consent); Minn. Stat. Ann. § 144.344 (medical services may be given to minors without parent or guardian's consent when, in the health professional's judgment, the risk to the minor's life or health is of such a nature that treatment should be given without delay and the requirement of consent would delay or deny treatment).

[4] *E.g., Miller v. R.I. Hosp.*, 625 A.2d 778, 784 (R.I. 1993) ("Equally as well established as the informed consent doctrine is the exception to it for emergencies"); *Kozup v. Georgetown Univ.*, 851 F.2d 437, 439 (D.C. Cir. 1988) (recognizing exception from requirement of parental consent in emergencies); *Luka v. Lowrie*, 136 N.W. 1106, 1110 (Mich. 1912) (parental consent to emergency amputation of minor's mangled foot implied); *Jackovach v. Yocom*, 237 N.W. 444, 449 (Iowa 1931) (parental consent to emergency amputation of minor's mangled hand implied). *Accord* Restatement (Second) of Torts § 892D (1979) (no liability for acting without consent if "an emergency makes it necessary or apparently necessary, in order to prevent harm to the other, to act before there is opportunity to obtain consent from the other or one empowered to [act] for him"); Rosovsky, *supra* note 2, § 5.2.1; English & Kenney, *supra* note 2, at iv.

provides for implied consent, in a variety of circumstances.[5]

These statutes and the underlying common-law "implied consent" doctrine wisely recognize that in emergency situations a doctor should not be restricted from acting without delay and without fear of potential liability. In such situations, parental consent may be presumed – precisely because *immediate* action is

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[5] *See, e.g.*, N.H. Rev. Stat. Ann. § 507-E:2 (2005) (to establish civil liability for a doctor's failure to obtain informed consent, plaintiffs must demonstrate that the "treatment, procedure, or surgery was performed in *other than an emergency situation*") (emphasis added); 1-13 New Hampshire Civil Jury Instructions § 13.2 (2004) ("Generally, a doctor, *in a nonemergency situation*, has a duty to obtain the consent of the patient or other person authorized to give consent prior to providing treatment.") (emphasis added); New Hampshire Office of the Attorney General, Op. No. 85-134 (Oct. 11, 1985) (describing "exceptions" to general rule that parents must consent to medical treatment for minors, including when "an emergency exists"); N.H. Rev. Stat. Ann. § 627:6(VII) (2005) (medical personnel may use reasonable force to provide necessary medical treatment in emergency when "no one competent to consent" can be consulted and "a reasonable person concerned for the welfare of the patient" would consent); N.H. Rev. Stat. Ann. § 153-A:18 (2005) ("No licensed emergency medical care provider or any health professional shall be subject to civil liability based solely upon failure to obtain consent in rendering emergency medical services [as defined by N.H. Rev. Stat. Ann. § 153-A:2(VI) (2005)] to any person, regardless of age, where the person is unable to give consent for any reason, including minority, and where there is no other person reasonably available who is legally authorized to give consent to the providing of such care, provided that the licensed emergency medical care provider, or health professional, has acted in good faith without knowledge of facts negating consent"). *Accord New Hampshire Practice Series: Personal Injury: Tort and Ins. Practice* § 6:05 (2005) (citing and quoting N.H. Rev. Stat. Ann. § 507-E:(2005)).

necessary to protect the young person's health. As one textbook explains in reference to civil liability:

> [W]hen a minor is in need of urgent medical attention, the physician or other health service provider must be *encouraged* to provide treatment free from the fear of liability, thereby enabling the professional to attend to the patient's need without first compromising his or her best judgment.

Morrissey, et al., *supra* note 2, at 53.[6] In situations when doctors may face *criminal* liability for treating a minor without parental involvement – as is the case with the New Hampshire Act – there is even more reason to ensure that doctors should be permitted to "attend to the patient's need" in emergency situations free from "fear of liability." *Id. Accord Colautti v. Franken*, 439 U.S. 379, 396 (1976) (recognizing that potential for criminal liability may have a "profound chilling effect" on physicians' willingness to perform abortions as indicated by medical judgment).

Because it is so important that minors receive necessary emergency care without delay, the American

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[6] *Accord Sullivan v. Montgomery*, 279 N.Y.S. 575, 577 (N.Y. Cty. Ct. 1935) ("To hold that a physician or surgeon must wait until perhaps he may be able to secure the consent of the parents ... before ... giving to the person injured the benefit of his skill and learning, to the end that pain and suffering may be alleviated, may result in the loss of many lives and pain and suffering which might otherwise be prevented"); *Luka*, 136 N.W. at 1111 ("[N]o rule should be announced which would tend ... to deprive sufferers of the benefit of [medical] services"); *Jackovach*, 237 N.W. at 451 ("If the surgeon is not to be permitted to honestly use his best judgment upon the necessity for an operation, without waiting to get the consent of either the patient or his parents, then is the skilled hand of the expert stayed by an unreasonable rule, often to the detriment of the patient and humanity at large.").

Academy of Pediatrics, in a policy statement endorsed by the American College of Surgeons, the Society of Critical Care Medicine, and the American College of Emergency Physicians, cautions that "[a]ppropriate medical care for the pediatric patient with an urgent or emergent condition should *never* be withheld or delayed because of problems with obtaining consent." American Academy of Pediatrics, Committee on Pediatric Emergency Medicine, *Policy Statement: Consent for Emergency Services for Children and Adolescents* (Mar. 2003), http://aappolicy.aappublications.org/cgi/content/full/pediatrics;111/3/703 (emphasis added). Indeed, the American Academy of Pediatrics cautions doctors that in certain circumstances, federal law may *require* them to act quickly in emergency situations even if parental consent has not been obtained. *Id.* (citing and discussing 42 U.S.C. § 1395dd (2005), the federal statute that imposes requirements for treatment on hospital emergency departments).

There is no reason why young women and doctors should be required to go to court to obtain permission for emergency abortion procedures when obtaining judicial permission is not required in other types of medical emergencies. The record here establishes – and other briefs before this Court discuss in detail – the health-threatening situations that require emergency abortion procedures, in which any delay in the procedure increases the potential negative consequences.

For instance, the Declaration of Dr. Wayne Goldner, Joint Appendix ("J.A.") 23-26, ¶¶ 8-15, describes several specific conditions that could require immediate abortion to protect a minor's health, including: (1) preeclampsia, or pregnancy-related hypertension, which may result in liver or kidney disruption, bleeding, vision loss, or seizures; (2) premature rupture of the membranes surrounding a fetus, which can lead to an infection of the placental lining called chorioamnionitis, creating the risk

of scarring of the reproductive organs and resultant infertility, chronic pain, and abdominal abscess; (3) spontaneous chorioamnionitis, which can result in serious, chronic pain, loss of future fertility, or damage to major organ systems; (4) other pelvic infections with similar risks of infertility and future chronic pain; and (5) heavy bleeding from the uterus, creating the risk of dangerously low blood pressure, permanent kidney and liver damage, and infertility.

Similarly, the *amicus* brief submitted by the American College of Obstetricians and Gynecologists, the American Medical Association, the New Hampshire Medical Association, and a variety of other leading medical groups explains in detail the potential threats to young women's health during pregnancy that may require immediate abortion procedures, as well as the potential harms that minors may suffer if such necessary immediate medical care is not available to them. *See* Brief for the American College of Obstetricians and Gynecologists, *et al.*, as *Amici Curiae*.

In light of these substantial health concerns and the delay inherent in requiring a court proceeding, precisely the same considerations that support the rule that doctors should be able to exercise medical judgment quickly in all other emergency situations also compel the conclusion that doctors should be permitted to perform emergency abortions necessary to preserve women's health without first going to court.

II. Exempting Emergency Abortions From the General Rule Regarding Medical Care in Emergencies Will Threaten Young Women's Health.

Requiring young women and their doctors to go to court to obtain judicial permission for necessary emergency abortion procedures will not only be an anomaly – because, as discussed above, physicians are

permitted to act appropriately to provide immediate treatment in other medical emergencies without first going to court – it will also necessarily add delay to the process and thus further threaten young women's health. The fact is, for a number of reasons, requiring a pre-procedure court hearing simply will not effectively replace a statutory health exception.

First, requiring doctors to delay emergency care will necessarily endanger young women's health. Requiring a young woman and her doctor to obtain court permission in medical emergency situations will add such delay, even if immediate court access were available – and it is not. *Second*, relying on New Hampshire's bypass provision is particularly problematic because the provision does not ensure the kind of immediate access to courts that even the State concedes is necessary. *Third*, nationwide experience in states with judicial bypass mechanisms demonstrates that courts may not be easily accessible to minors under routine circumstances. The problems minors face in accessing courts in other states raise questions about whether New Hampshire courts would be accessible in the emergency context.

A. The Judicial Process Itself Will Create Delay, Endangering Minors' Health.

Requiring judicial permission for emergency abortions will inevitably add delay to the procedure, endangering young women's health. In a health-threatening emergency, the minor and her doctor face a situation in which any delay in providing an abortion may result in permanent damage to the minor's health.[7] Attempting to locate parents, and learning about the

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[7] *See* J.A. 23 (Decl. of Dr. Wayne Goldner, M.D. ¶ 7); Brief for the American College of Obstetricians and Gynecologists, *et al.*, as *Amici Curiae*.

bypass procedure if they cannot be located for immediate notification, takes time. Locating a judge and scheduling a hearing takes time. Preparing for and going through a judicial hearing takes time. In an emergency situation when every hour or minute counts, requiring judicial intervention may spell the difference between damaging and preserving a minor's health.[8]

Moreover, the bypass court will be required, on a moment's notice and with little opportunity for a detailed proceeding, to assess an area in which the judge will almost certainly have little knowledge before the hearing. The court will have to learn about a complex medical condition and decide whether an abortion without parental notification is in the young woman's best interest.

In a similar context, the New Hampshire Supreme Court has recognized that the judicial branch is not an acceptable substitute for permitting the physician to act in emergency circumstances. In *Opinion of the Justices*, 465 A.2d 484 (N.H. 1983), the New Hampshire court considered a legislative proposal that doctors be permitted to administer medication and/or treatment to

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[8] Moreover, the delay caused by the judicial proceeding will be added to the inevitable delay that occurs even before judicial permission for a procedure is sought. The young woman first must seek treatment, of course, before a procedure may be performed. Further delay is inherent in the doctor's examination and diagnosis, her determination that an immediate abortion is medically indicated, and her discussions of the minor's health and prognosis, and the necessity of an emergency abortion, with the minor herself. The doctor and minor must also discuss whether the minor's parents are available, whether the minor wishes to notify them, and then must attempt to locate parents if the minor desires parental involvement. Requiring the minor and doctor to seek *judicial* permission to perform the emergency abortion adds unnecessary additional delay.

patients who had been involuntarily committed, based on the *initial* determination that commitment was appropriate. Rejecting that proposal, the court made plain that there were emergency situations in which administration of medication or treatment without the patient's consent would be appropriate and further made plain that a judicial determination in such circumstances was not required. *Id.* at 490 ("[W]e do not imply that a judicial finding of 'emergency' is constitutionally required . . . [S]uch a finding would clearly be impractical because of the urgent need for treatment in emergency situations.").

Other courts similarly question the efficacy of judicial interjection into complicated medical emergencies at all – even in cases when court involvement might be arguably necessitated because a necessary consent for the procedure has actually been refused. As the Court of Appeals for the District of Columbia has noted, emergency judicial proceedings are fraught with difficulty and less likely than more deliberative proceedings to produce a correct result:

> [A]ny judicial proceeding in a case such as this will ordinarily take place – like the one before us here – under time constraints so pressing that it is difficult or impossible for the mother to communicate adequately with counsel, or for counsel to organize an effective factual and legal presentation in defense of her liberty and privacy interests and bodily integrity.

In re A.C., 573 A.2d 1235, 1248 (D.C. 1990); *see also* Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 Harv. Women's L.J. 9, 49 (1987) (describing "procedural shortcomings rampant" in cases of medical emergencies).

B. New Hampshire's Statute Will Not Ensure Immediate Judicial Access in Medical Emergencies.

The State does not even attempt to argue that there is some independent State interest requiring *judicial* permission for emergency abortion procedures when a minor's health is threatened, rather than permitting doctors to act immediately to preserve patient health as they do in other medical emergencies. Instead, the State claims only that a requirement for judicial permission will not *harm* young women because access to courts and judicial decisions will be immediate and courts will "[c]ertainly" authorize abortions necessary to preserve a minor's health "within minutes, if necessary." Pet. Br. at 23.

Even if the State's claim of immediate court access were correct, the requirement that minors and doctors obtain judicial permission for an emergency abortion procedure itself adds delay, which will threaten young women's health. *See supra* § II.A. There is, moreover, no evidence to support New Hampshire's claim that young women and their doctors will have immediate access to the courts in emergency situations, particularly when those situations arise, as they inevitably will, after court hours and on weekends and holidays.[9]

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9 In addition, if New Hampshire's judicial bypass system were to function as a replacement for a statutory emergency health exception, the serious potential confidentiality issues recognized by the First Circuit, *see Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 64-65 (1st Cir. 2004), would be compounded. Young women seeking court permission for emergency medical care would face the prospect of disclosing the details of their medical condition as well as their pregnancy and desire for an abortion. Moreover, potential loss of confidentiality might lead young women not only "to delay or decline to seek an abortion out of fear that her parents would

To the contrary, the Superior Courts, District Courts, Probate Courts, and Family Division Courts are only open Monday through Friday, with business hours and telephone access hours ranging from 8:00 am until 4:30 pm. *See* New Hampshire Judicial Branch, *Find Your Court*, http://www.courts.state.nh.us/courtlocations/index.htm. The courts are also closed on twelve holidays during the year. New Hampshire Judicial Branch, *2005 Court Holidays*, http://www. courts. state.nh.us/ sitewidelinks/court_holidays.htm. The New Hampshire Judicial Branch's website offers no guidance for how a person in an emergency situation may access a court or a judge after hours, on weekends, or on holidays. *Id.*; *see also* New Hampshire Judicial Branch, *Frequently Asked Questions, What Hours are the Courts Open*, http://www.courts.state.nh.us/sitewidelinks/faqindex.htm #COURT%20HOURS (no information on emergency access to courts or judges).

Calls placed to the New Hampshire courts after hours and on weekends confirm that no telephone or voice mail mechanism is in place to guide people in emergency situations who require access to the courts. Some courts had no voice mail messages at all. There was no information for reaching an "emergency judge" after hours or on holidays provided on *any* court's voice-mail system. The majority of voice-mail messages simply advised callers that the court was closed and offered to permit them to leave a voice mail message or to dial a

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find out," *id.* at 64, but also to delay or decline to seek necessary *medical* treatment for a health-threatening medical condition. *Accord* Diane Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA 710 (2002); American Academy of Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 PEDIATRICS 746, 749 (1996) ("even a perceived lack of confidentiality in health care regarding sexual issues deters [minors] from seeking services").

specific extension. A few court messages advised callers to call either 911 or the police if they faced an emergency or sought a domestic violence restraining order.

No procedures to ensure immediate access to courts had been established when the enforcement of the law was enjoined on December 29, two days before it was to go into effect. Nor does the statute require the kind of immediate *decision* necessary to address health emergencies, even if 24/7 access was in fact provided. N.H. Rev. Stat. Ann. § 132:24 (2005) (requiring decision within seven days).

As one court considering a similar 24/7 access provision explained:

> The statutory requirement that minors shall have access to the trial and appellate courts 24 hours a day, 7 days a week is meaningless.... [B]y local rule the trial courts are open only during regular business hours. Even if courts have 24 hour drop boxes for 24 hour filing of documents, this is not around the clock access to courts. Judges, law clerks, court reporters, and others necessary for judicial action are not available on a 24 hour basis, seven days a week. This provision, therefore, assures nothing by way of expedition....

Planned Parenthood of Southern Arizona v. Lawall, 180 F.3d 1022, 1031 (quoting district court's opinion), *amended on other grounds, reh'g den'd*, 193 F.3d 1042 (9th Cir. 1999).

New Hampshire, however, claims that state courts are currently accessible to address emergency situations "regardless of the time of day or night" in instances of domestic violence cases, search and arrest warrants in criminal cases, or child protection orders. Pet. Br. at 22. These situations are different, however, because they mandate *police involvement* in seeking emergency court intervention – unlike the emergency abortion context, which would leave it to a woman and her doctor to locate

a judge after-hours or on a weekend or holiday and schedule an emergency hearing. In fact, the sole state statutory scheme that the State cites in support of its claim that courts are already available around-the-clock (Pet. Br. at 22) requires *police officers* to assist in seeking emergency telephonic protective orders from courts. N.H. Rev. Stat. Ann. § 173-B:10(d) (2005); *see also id.* § 173-B:4 (2005) (telephonic domestic violence orders must be issued "to a law enforcement officer"). Consistent with this mandate, the New Hampshire Judicial Branch website advises people who are seeking emergency domestic-violence-related protective orders after hours or on weekends or holidays to call the police, who will then help the complainant locate and call a judge.[10] The court's own protocols make plain, moreover, that the method for

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10 New Hampshire Judicial Branch, *Domestic Violence Restraining Orders*, http://www.courts.state.nh.us/superior/selfhelp/Restraining%20Orders.htm. *See also* New Hampshire District Court, *Domestic Violence Case Protocols*, Ch. 3, Protocol 3.1, http://www.courts.state.nh.us/ district/protocols/dv/index.htm (protocol for emergency telephone hearing requires *a police officer* to take a report of abuse, assist the plaintiff in filling out the form, locate a judge, and request the verbal order for protection); New Hampshire District Court Improvement Project, in Cooperation With the Family Division and N.H. Probate Court, *Protocols Relative to Abuse & Neglect Cases and Permanency Planning*, Ch. 3 (Apr. 2003), http:/www.courts.state.nh.us/district/protocols/abusenegprotocol.htm (describing requirement that *police officer* seek 24-hour order regarding protective custody for children removed from homes in emergency circumstances); New Hampshire Bar Ass'n, *Domestic Violence: It Helps To Know The Law* (May 2000), http://www.nhbar.org/for-the-public/domestic-violence-it-helps-to-know-the-law.asp ("If you are in immediate danger of domestic abuse and no court is open, you may get an emergency protective order by contacting the nearest police department. A police officer can help you fill out the form proper and reach a judge by telephone").

locating judges and scheduling emergency hearings is hit-or-miss, even for the police. Police officers are provided with judges' home numbers and directed to call around until they happen to locate an available judge.[11]

C. Experience in Other States Demonstrates that the Judicial Bypass Alternative Is Not Sufficiently Expeditious or Accessible To Protect Critically Ill Young Women.

Finally, experience in other states with existing judicial bypass laws reinforces the conclusion that courts in New Hampshire simply cannot function as a substitute for a medical emergency exception. Even in states with long-established judicial bypass systems, delays and bureaucratic hurdles imposed by the court system to obtaining a judicial bypass are common.

Many courts in states with judicial bypass laws are uninformed about their state's judicial bypass law and ill-prepared to accommodate even non-emergency requests for a judicial bypass. *See, e.g.*, Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 LAW & SOC. INQUIRY 73, 81 (1999); Helena Silverstein & Leanne Speitel, *Honey, I Have No Idea: Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 IOWA L. REV. 75 (2002).

For instance, Alabama enacted a parental consent law that went into effect in 1987. *See* Silverstein, *supra*,

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[11] New Hampshire Judicial Branch, District Court, *Domestic Violence Case Protocols*, Ch. 3, Protocol 3.1, http://www.courts.state.nh.us/district/protocols/dv/ index.htm (advising police officers, who are provided with judge's home telephone numbers, to "first try to reach a judge" from the court where the plaintiff resides, and if "unable to reach any judge" assigned to that court, then "try to reach a judge who resides in a city or town close to where the plaintiff resides").

Honey, I Have No Idea, 88 Iowa L. Rev. at 84. But a 2001 study, conducted *nearly fifteen years after the law went into effect*, illustrated that only half of the counties in the state were prepared to implement the judicial bypass. *Id.* at 88-91. These thirty-four counties were judged "prepared" because they showed knowledge of the bypass process, specifically that the hearing was confidential and the minor had a right to a court-appointed attorney. *Id.* Yet, even out of these "prepared counties," only five provided immediate and complete responses to the initial request for information. *Id.* at 94. The others required the caller to make anywhere from three to twelve phone calls, pressing court personnel to receive correct information. *Id.* Callers were often initially misinformed about the availability of the judicial bypass with answers such as: "The last time I heard, a new law was passed that said that was no longer legal .... You'd have to have parental permission." *Id.*

Even among the "prepared" courts in Alabama, personnel who answered the phone provided misleading information about how quickly the petition would be heard. *Id.* at 94-95. For example, in Alabama, even though the statute requires courts to rule on petitions in seventy-two hours, in the majority of "prepared" counties, callers did not receive accurate information on their first phone call regarding how quickly a bypass petition would be heard.

The response in the one-half of unprepared counties is more troubling. Many personnel expressed doubt that the minor could obtain a court order to avoid parental consent in *any* court. *Id.* at 101. One respondent told a caller: "I have no idea Ma'am, I don't know if a judge gives permission like that or not. We've never had a case like that." *Id.* Others said "I talked with our juvenile court judge. And he said that was no longer a law, and that they could no longer do that"; "She has to have her parent's permission. In the state of

Alabama they're required to have their parent's permission"; "There is no such thing Ma'am, not through our court system." *Id.*

Other court personnel suggested the court would not grant the bypass petition. Representative of these comments is this court employee's answer to a request for information about how to obtain permission for an abortion without informing her parent: "Honey, I have no idea, I just have no idea. I feel like I don't believe a judge or even a lawyer actually would do that. . . . I don't believe it would be in the best interest for a judge or a lawyer to make consent like that without the minor's parents knowing about it." *Id.* at 102. Another employee advised the caller that her petition for a judicial bypass would not be granted because the judge "doesn't believe a child should have this done without her parents." *Id.* at 103. The employee further discouraged the minor by stating that the judge had not granted a petition for a minor advised by her doctor to obtain an abortion for medical reasons. *Id.*

Alabama's inadequate attempts to implement constitutionally sufficient judicial bypass proceedings are mirrored in other states in which similar research has been conducted. Nearly four years after Pennsylvania's parental consent provision took effect, two-thirds of its county courts remained unprepared to handle judicial bypass inquiries. *See* Silverstein, *supra*, *Road Closed,* 24 Law & Soc. Inquiry 73. In calls made to state courts, researchers discovered that only eight of Pennsylvania's sixty judicial districts were able to provide complete information about the parental involvement law, and even that information was not easy to obtain. *Id.* at 81-82.

The most common response the researchers received was that the caller would have to get an attorney, even though Pennsylvania's parental involvement law requires the court to advise the minor

that she has a right to court appointed counsel. *Id.* Many simply said to make some phone calls or to look in the yellow pages. *Id.* at 83. Although some court personnel mentioned that papers could be filed, none were able to tell the callers more specifically what was required. *Id.* at 85. At one point the researchers even spoke to a judge who, although unfamiliar with the law and unable to tell the caller about it, adamantly refused to hear her case. *Id.* at 87-88.

Experience in other states also confirms that not all judges are willing to hear bypass petitions. For instance, four of the nine judges on the Shelby Circuit Court in Memphis Tennessee are unwilling to hear bypass applications. Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, The New York Times, September 4, 2005, *available at* http://www.nytimes.com/2005/09/05/national/04recuse.html?oref=login&pagewanted=print (citing one instance in which bypass judge explained that "[t]aking the life of an innocent human being is contrary to the moral order . . . . I could not in good conscience make a finding that would allow the minor to proceed with the abortion"); *see also* Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 85-86 (1995) (citing data that in Minnesota and Massachusetts, some judges are not available to hear parental involvement cases). In a situation in which a minor and her doctor are trying to locate a judge to hear an immediate bypass petition in a medical emergency, particularly when the courts are closed, the fact that some judges may not be willing to hear bypass proceedings at all could result in the bypass being unavailable or available only after delay that further threatens the young woman's health.

The research in these other states demonstrates the difficulty courts have in guaranteeing timely and confidential bypass procedures for healthy minors. This experience cautions that doctors and minors may be

frustrated if they are required to seek immediate court hearings to safeguard the health of sick minors.

CONCLUSION

This Court should reject New Hampshire's invitation to substitute the judicial bypass procedure for a statutory health exception. In emergency situations, established law and medical practice permit doctors to act quickly to address medical emergencies, *without* first going to court. *See supra* § I. In order to cure the constitutional infirmity in its Parental Notification Act, however, New Hampshire suggests that minors and doctors should be required to seek and obtain prior court permission for emergency abortion procedures necessary to preserve minors' health. Requiring court permission for emergency abortions will create an unwarranted and unwise exception to the general rule permitting doctors to act in emergency situations, one that will necessarily

create delay and threaten minors' health. The judgment of the First Circuit should be affirmed.

Respectfully submitted,

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October 12, 2005

THE AMICI ORGANIZATIONS

The Center for Adolescent Health & the Law supports laws and policies that promote the health of adolescents and their access to comprehensive health care. The Center conducts research, analyzes laws and policies, prepares and disseminates publications, provides training and technical assistance, and engages in advocacy. The Center's work addresses a broad range of issues influencing the financing, delivery, and utilization of comprehensive health services for adolescents. The Center's work falls into two primary program areas that together encompass the majority of barriers that adolescents must overcome to have access to comprehensive health care: consent and confidentiality; and financial access to services.

Jane's Due Process, Inc. (JDP) is a non-profit organization incorporated in 2001 to create a statewide response in Texas to minors seeking abortion services under the Texas parental notification law. Jane's Due Process has received in excess of 5,000 hotline calls from callers in at least 127 Texas counties and has screened 1,903 minors for services as of the end of 2004. JDP's website receives an average of 12,000 visits per month. Of the 1,903 minors screened, 35% report being unable to contact a parent because she or he is missing, deceased, or incarcerated. Along with a 24-hour toll-free hotline and pro bono lawyer referral program, JDP offers help with transportation to medical and legal appointments, childcare, and overnight accommodations, as well as financial assistance for pre-court sonograms and, when necessary, subsidies to cover the increased cost of an abortion procedure due to delays by the legal system.

The Judicial Consent for Minors Lawyer Referral Panel is an association of over 100 Massachusetts lawyers who represent minors seeking judicial consent for abortion under Mass. Gen. Laws. ch. 112, § 12S. The Panel is sponsored by the Women's Bar

Association of Massachusetts and the National Lawyers Guild. The Panel has operated since the Massachusetts judicial bypass went into effect in April, 1981. It is led by a steering committee which keeps in regular touch with Panel attorneys, reviews summaries of hearings, prepares legal updates, and meets with clerks and judges concerning problems in implementing this law.

The Juvenile Law Center (JLC) was founded in 1975 as a non-profit legal organization. JLC works on behalf of children who have come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. Although JLC primarily serves the children of Pennsylvania, it regularly lends its expertise to national child advocacy efforts.

With more than 150,000 members, the **National Association of Social Workers (NASW)** is the largest organization of professional social workers in the world. The **National Association of Social Workers, New Hampshire Chapter**, represents 840 members. Created in 1955 by the merger of seven predecessor social work organizations, the purposes of NASW include improving the quality and effectiveness of social work practice in the United States and developing and disseminating high standards of social work practice, concomitant with the strengthening and unification of the social work profession as a whole. NASW's members are highly trained and experienced professionals who counsel individuals, families, and communities in a variety of settings, including schools, hospitals, mental health clinics, senior centers, and private practices. The NASW policy, "Adolescent Pregnancy and Parenting," supports a range of services to help prevent teen pregnancy including "safe, legal, affordable, and confidential health and reproductive health services, including sex education,

contraception, pregnancy testing, abortion, prenatal care, birthing services, postnatal care, and pediatric care, especially well baby services . . . ."

The **National Center for Youth Law (NCYL)** is a non-profit organization located in Oakland, California. Since 1970, NCYL has worked to improve the lives of poor children nationwide. NCYL provides representation to children and adolescents in class action litigation and other cases which have broad impact. The Center also engages in legislative and administrative advocacy at the national and state levels. NCYL provides support for the advocacy efforts of others through its legal journal and training programs, and by providing technical assistance to other advocates for youth nationwide. One of NCYL's particular concerns is access to critical health care for adolescents.

The **Women's Bar Association of Massachusetts (WBA)** is a statewide professional organization committed to the protection of the rights of women before the court system and regulatory bodies, in the state and federal legislatures, and in society generally. The WBA has filed amicus briefs with the state and federal courts in matters involving reproductive health, reproductive rights, sex discrimination, sexual harassment and equitable treatment of women by the courts, legislature and regulatory bodies. In particular, the organization has participated as an amicus and worked on legislation concerning access to reproductive health clinics, restrictions on abortion counseling, and minors' access to abortion. The WBA is a sponsor of the Judicial Consent for Minors Lawyer Referral Panel, an association of over 100 Massachusetts lawyers who represent minors seeking judicial consent for abortion under M.G.L. ch. 112, § 12S.

The **Women's Law Project (WLP)** is a non-profit legal advocacy organization in Pennsylvania. Founded in 1974, the Law Project works to advance the legal and

economic status of women and their families through litigation, public policy development, education, and one-on-one counseling. Throughout the past thirty-one years, WLP has played a leading role in the struggle to protect women's privacy in the context of reproductive health decisions. WLP served as co-counsel for plaintiffs in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

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No. 04-1144

IN THE
SUPREME COURT OF THE UNITED STATES

KELLY A. AYOTTE, Attorney General of the State of New Hampshire, in her official capacity,
Petitioner,

— v. —

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* CENTER FOR REPRODUCTIVE RIGHTS AND 30 ORGANIZATIONS COMMITTED TO PRESERVING THE CONSTITUTIONAL RIGHT TO ABORTION, IN SUPPORT OF RESPONDENTS

(List of *Amici Curiae* on inside cover)

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October 12, 2005

AMICI CURIAE

Abortion Access Project
American Jewish Congress
Asian Communities for Reproductive Justice
Association of Reproductive Health Professionals
Atlanta Women's Medical Center
California Women Lawyers
Center for Reproductive Rights
Cherry Hill Women's Center
Choice USA
Family Planning Association of Maine
Guttmacher Institute
Hartford GYN Center
Institute for Reproductive Health Access
Law Students for Choice
MADRE
Medical Students for Choice
National Abortion Federation
National Association of Women Lawyers
National Coalition of Abortion Providers
National Family Planning & Reproductive Health Association
National Latina Institute for Reproductive Health
National Network of Abortion Funds
National Partnership for Women & Families
National Women's Law Center
Native American Women's Health Education Resource Center
Northeast Women's Center
Philadelphia Women's Center
Physicians for Reproductive Choice and Health
ProKanDo
Sexuality Information and Education Council of the United States
Women Lawyers Association of Los Angeles

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are organizations committed to improving access to reproductive health care and specifically to securing constitutional protections for the right to choose abortion. Individual statements of interest of the *amici* are contained in the Appendix to this brief.[1]

SUMMARY OF ARGUMENT

The New Hampshire statute at issue in this case imposes notification requirements and a forty-eight hour waiting period on pregnant minors who choose abortion. It provides no exception from those requirements when a medical emergency threatens a young woman's health, even though the delays typically involved in meeting those requirements can exacerbate health threats. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 880 (1992) (discussing emergency conditions that can lead to substantial and irreversible health consequences).

Relying on *United States v. Salerno*, 481 U.S. 739 (1987), New Hampshire, the United States and several amici contend that limitations on federal judicial power and separation of powers considerations rule out pre-enforcement constitutional challenges seeking facial invalidation of restrictions on abortion. They argue that federal courts are powerless to remedy the defect in the Act until young women come before the courts with actual health-threatening

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[1] The parties' letters consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation of this brief.

medical emergencies seeking as-applied injunctive relief.[2] (Brief of Petitioner ("Pet. Br.") at 41-42; see also Brief for the United States as Amicus Curiae Supporting Petitioner ("U.S. Br.") at 24.) They also argue by extension that this Court's well-established jurisdiction recognizing third party standing in, *inter alia*, cases involving the right to privacy generally and the right to abortion specifically should be scuttled.

These contentions ignore that this Court has recognized that physicians have standing to represent the interest of their patients seeking abortions and has allowed pre-enforcement challenges to, and granted facial invalidation of, abortion restrictions on numerous occasions. Throughout its jurisprudence in the area, this Court has paid careful attention to the appropriate limitations on judicial power while also taking seriously its duty to protect individuals from irreparable harm to their health and constitutional rights. The Court's careful balance between these two constitutional

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[2] The terms "pre-enforcement," "facial," and "as-applied" are used with different meanings in different contexts. Here we use "pre-enforcement" to mean prior to a statute's effective date, *i.e.*, before the statute can be enforced and before compliance with a statute can be demanded. We use both "facial" and "as-applied" in two senses. A statute has a "facial defect" if, by its very words, it is at odds with the Constitution. Thus, a statute requiring parental consent for abortions obtained by minors that contains no judicial bypass mechanism whatsoever and therefore delegates an absolute veto power to parents contains a "facial defect." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72-75 (1976). By contrast, a statute may be unconstitutional "as applied" even if it contains no "facial defect" because the manner in which the government has enforced or plans to enforce the statute violates the Constitution. A second sense of "facial" and "as-applied" relates to the remedy fashioned by the court: "facial invalidation" means that the government is entirely barred from enforcing a statute, while "as-applied invalidation" means that the government is not barred from enforcing a statute in its entirety, but only in certain circumstances or as to certain individuals or groups of individuals.

cornerstones has been vital to protecting women's health, as well as the right of each American woman to have some control over her destiny by deciding herself when, and if, she will bear a child.

ARGUMENT

I. Facial Invalidation of Unconstitutional Statutes in Pre-enforcement Challenges is Necessary to Protect Women's Health and Their Rights.

This Court's willingness to allow women to bring pre-enforcement facial challenges to unconstitutional abortion restrictions and to grant facial injunctive relief has been essential to protect against the chill on the provision of abortion services that would otherwise result and ultimately to insure that women do not have to suffer harm before obtaining relief.

A. The "No Set of Circumstances" Rule Is Not the Standard For Facial Invalidation of All Unconstitutional Statutes.

Contrary to the contentions of the State and United States, the "no set of circumstances" rule has not been the standard litigants must meet in order to succeed in invalidating an unconstitutional statute on its face. In *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 1948 (2004), the Court noted that it has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term)" in several settings, including free speech and abortion cases.

This Court has granted facial injunctive relief on numerous occasions outside the abortion context without requiring that the statute be unconstitutional in every conceivable application. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 41 (1999) (finding unconstitutionally vague a municipal ordinance empowering police to arrest

persons in violation of order to disperse given to gang members loitering on public streets); *id.* at 69 (Kennedy, J. concurring) ("As interpreted by the Illinois Supreme Court, the Chicago ordinance would reach a broad range of innocent conduct."); *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (facially invalidating statute requiring persons validly stopped by police to provide "credible and reliable" identification, and explaining that the vagueness doctrine permits a "facial challenge if the law reaches 'a substantial amount of constitutionally protected conduct'") (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 394 (1982)); *Louisiana v. United States*, 380 U.S.145, 150 (1965) (facially invalidating state law requiring a person seeking to register to vote to satisfy registrar that he could understand a constitutional provision because the grant of discretion to officials chilled African-Americans from seeking to register); *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964) (facially invalidating statute prohibiting members of Communist registered organizations from obtaining passport as violating the right to travel because it "swe[pt] too widely and too indiscriminately").

Similarly, this Court has regularly invalidated statutes restricting abortion on their face, starting with the statute at issue in *Roe*, even where there are some circumstances in which they could be applied constitutionally. In *Roe v. Wade*, 40 U.S. 113 (1973), the Court struck down a Texas statute that allowed abortion only to preserve the woman's life, even though that statute was plainly amenable to constitutional applications in some cases. *See Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1178 (1976) (Scalia, J., dissenting from the denial of petition for certiorari) (noting that the Court "seemingly employ[ed] an overbreadth approach in *Roe v. Wade*"). The Court has also granted facial injunctive relief to strike down the Georgia statute requiring in-hospital abortions and committee review that was held unconstitutional in *Doe v. Bolton*, 410

U.S. 179 (1973); the statute requiring two-physician approval that was enjoined in *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); the parental involvement statutes that were enjoined in *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), *overruled in part on other grounds by Casey*, 505 U.S. at 881-82, 884-85 (1992), and *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*") (plurality opinion); statutes requiring second trimester abortions be performed in hospitals in *City of Akron*, 462 U.S. at 434-39, and *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983); and Pennsylvania's spousal notification statute struck down in *Casey*, 505 U.S. at 893-95, even though all were amenable to some constitutional applications. Any lingering question that the *Salerno* rule remained applicable in third-party facial challenges to abortion statutes was resolved in the negative when *Casey* held facially unconstitutional part of a statute that presented a "substantial obstacle" to exercise of a woman's right to choose abortion in a "large fraction" of cases, 505 U.S. at 895, even though there clearly were constitutional applications.

B. Adoption of the State's *Salerno* Rule Would Threaten Women's Health and Would Chill the Provision of Abortions.

Two important concerns have led the Court to grant injunctive relief invalidating on their face statutes restricting abortion. The decision to terminate a pregnancy is cloaked with physical and mental health consequences. *Casey*, 505 U.S. at 880 (*Roe v. Wade* "forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health"). If statutes were not invalidated on their face and, instead, each woman was required to bring individual as-applied challenges, women would suffer harm to their health and rights in two ways.

First, if an individual as-applied challenge becomes the sole means of vindicating abortion rights, the delays that regularly occur in our adversarial legal system[3] would threaten to harm women's health even where there is not medical emergency. *See, e.g., Wynn v. Carey*, 582 F.2d 1375, 1389 n.29 (7th Cir. 1978) ("Speed is critical in the abortion context.").[4] Of course, in a medical emergency, when a patient needs treatment *without* delay, a judicial bypass is never adequate. The process of obtaining as-applied constitutional relief from the federal court system is simply not fast enough to protect women from worsening and harmful medical conditions.[5] *See Thornburgh*, 476 U.S. at 769-72 (striking second physician requirement because delay in finding second physician would put woman's health at

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[3] Such delays include the potential for an order, which can be in effect for months, issued by a single Circuit Judge staying a lower court injunction in favor of a plaintiff. *Richmond Med Ctr. for Women v. Gilmore*, 144 F.3d 326 (4th Cir. 1998) (Luttig, J., single Judge), *granting stay of* 11 F. Supp. 2d 795 (E.D. Va. 1998).

[4] Even where the constitutional right to have an abortion is well-established, a zealous adversary may succeed in temporarily blocking a woman's access to abortion for a significant period of time. *See. e.g.*, Marie McCullough, *Court Injunction Halts Pa. Woman's Abortion*, Philadelphia Inquirer, August 2, 2002, at B-1.

[5] There is an enormous difference between requiring a minor to seek a judicial bypass in a non-emergency situation and forcing any woman to seek a judicial ruling on the constitutionality of a law that would deny her an abortion. (*Cf* U.S. Br. at 14 n5.) For example, in a judicial bypass: 1) the minor is not bringing complex constitutional claims based on complicated medical testimony in a challenge to state legislation, but instead goes to court to prove that she is mature and that the abortion is in her best interests in accordance with a statutory scheme; 2) the minor has an appointed lawyer; 3) the minor has no adversary; 4) there is a statutory scheme protecting the minor's confidentiality and the expeditiousness of the process. As daunting as judicial bypass procedures can be, *see Hodgson v. Minnesota*, 497 U.S. 417, 441-42 & nn. 29 &30 (1990), a constitutional challenge is much more difficult and time consuming.

risk); *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 353 (3d Cir. 1987) (Mansmann, J., concurring) (in case involving inmates' access to abortion services, noting that "there is apparently no procedure for expediting an application for court-ordered release in order to avoid [the delay which will] increase[] the risk of unavailability and danger from abortion"); *Wynn v. Carey*, 582 F.2d at 1389 n.29 ("Speed is critical in the abortion context.").

Second, if the only limitation on enforcement of abortion restrictions comes from a collection of as-applied rulings, physicians and their patients will continue to be chilled unless as-applied rulings apply to them without a doubt. As-applied injunctive relief simply does not give doctors and women the safe harbor they need. At the boundaries, any as-applied relief is somewhat unclear: does as-applied relief exempting "battered women" from a spousal notice statute exempt a woman who was beaten once by her husband, or only one who is beaten regularly by her husband. *Cf. Casey*, 505 U.S. at 895 (enjoining spousal notice on its face).[6] Does as-applied relief allowing women who cannot afford a hospital-based abortion to obtain second-trimester abortions outside hospitals require the physician to audit the women's financial assets as a precondition to performing an outpatient

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[6] In *Casey*, the Court recognized that a chilling effect would occur if the spousal notice requirement remained in effect. 505 U.S. at 894 ("the significant number of women who fear for their safety . . . are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."); *see also id.* at 897 ("Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband . . . prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto held unconstitutional in *Danforth* [428 U.S. 52]."). If each woman had been forced to proceed piecemeal and obtain an injunction based on the level of abuse in her individual circumstances, this chilling effect would have prevented other women from obtaining relief.

abortion? Does as-applied relief allowing a woman with preeclampsia to avoid an abortion restriction such as a mandatory delay law or parental notice requirement apply to another health condition?

There is little doubt that, no matter how skilled the drafting of an injunction against enforcement of a restriction with respect to a particular condition or category of conditions or defining a class of pregnant women, sufficient uncertainty about coverage will remain either to require additional litigation or chill the exercise of the right to an abortion. In each instance, the inherent vagueness of as-applied relief will cause women (and their physicians) to "steer far wider of the unlawful zone" than if the statute is facially invalid and the "State must bear the[] burden[]," *Speiser v. Randall*, 357 U.S. 513, 526 (1958), of enacting a new statute that respects constitutional rights.[7] *See also Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000)(facially invalidating statute because its broad ban would chill doctors from performing "the commonly used method for performing previability second trimester abortions," and noting that "[a]ll those who perform abortion procedures using that method must fear prosecution, conviction and imprisonment"); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., joined by Souter, J., concurring in denial of application to vacate stay) (*Salerno*'s "no set of circumstances" requirement "is inconsistent with *Casey*").

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[7] To make the relief clear would require courts to draft complicated and detailed schemes, rewriting the statutes in detail, an exercise that is clearly better left to legislatures. *See Salinas v. United States*, 522 U.S. 52, 59-60 (1997) ("Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.") (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements.").

Only facial invalidation of a restriction can prevent irreparable harm to women.

The same reasons that support a broad remedy for unconstitutional abortion restrictions also counsel for allowing physicians and their patients to determine the scope of their rights *before* a statute takes effect and before they have been subjected to the chilling effect of an unconstitutional statute. This Court has repeatedly approved relief granted in pre-enforcement challenges to laws burdening women's access to abortion. *See Stenberg*, 530 U.S. at 945-46 (in pre-enforcement challenge to statute criminalizing certain abortion procedures, finding statute "unconstitutional"); *Casey*, 505 U.S. at 845 (in pre-enforcement challenge to husband consent requirement, finding statute unconstitutional).[8]

If physicians and their patients are forced to wait until after a statute takes effect, doctors will hesitate in providing treatment with the result that the health of their patients will

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[8] *See also Hodgson v. Minnesota*, 497 U.S. at 450-55 (in pre-enforcement challenge to provision requiring notice to two parents of a minor's abortion, in the absence of an alternative means to obtain authorization for the abortion, finding statute unconstitutional); *Thornburgh*, 476 U.S. at 753 (in pre-enforcement challenge to omnibus abortion control act, finding numerous provisions of statute unconstitutional); *Planned Parenthood v. Ashcroft*, 462 U.S. at 481-82 (in pre-enforcement challenge to requirement that abortions after twelve weeks be performed in hospitals, finding statute unconstitutional); *City of Akron*, 462 U.S. at 425, 452 (in pre-enforcement challenge, numerous provisions of omnibus municipal ordinance regulating abortion held unconstitutional); *Bellotti II*, 443 U.S. at 651 (in pre-enforcement challenge to statute requiring parental consent for abortion, affirming judgment barring enforcement of statute "in any fashion," *Baird v. Bellotti*, 393 F. Supp. 847, 857 (D. Mass. 1975) (three-judge court)); *Colautti v. Franklin*, 439 U.S. 379 (1979) (in pre-enforcement challenge, finding "standard of care" requirements in performing abortions unconstitutional); *Danforth*, 428 U.S. at 75, 78-79, 83-84 (in pre-enforcement challenge to omnibus abortion statute, finding several provisions unconstitutional).

be damaged. For example, when a physician with a patient suffering from preeclampsia hesitates because of an unconstitutional statute, his or her patient is at risk of developing eclampsia at great risk to her health and then her life. Allowing pre-enforcement challenges, rather than forcing a physician to wait until the brink of medical tragedy to bring a lawsuit, avoids putting the physician in the position of simultaneously managing a very sick patient and litigating and giving testimony in a constitutional challenge. It also allows the courts to engage in a more deliberate examination of the constitutional challenge.

Nevertheless, New Hampshire and several of its *amici* argue that pre-enforcement relief is unavailable. As described above, the State contends that the courthouse doors are open only on an as-applied basis to a "flesh-and-blood" individual already experiencing a medical emergency. The United States describes its position as an objection to pre-enforcement *facial* challenges to abortion statutes. Although the United States asserts that it would allow the bringing of pre-enforcement challenges "on an as-applied basis before irreparable injury has actually been suffered," it then undercuts its own position in the next breath, stating that ripeness issues may arise, making such relief *un*available. (U.S. Br. at 15-16 & n.6.) Taken together, these arguments urge the Court to limit radically women's ability to vindicate their constitutional right to privacy.

C. Adoption of the State's *Salerno* Rule Will Flood the Federal Courts with Litigation and Thwart Women's Exercise of Their Privacy Rights

Those who argue that the *Salerno* rule applies in cases like this one seek to undermine *Roe v. Wade* and would replace the Court's typical facial invalidation of unconstitutional abortion statutes with a scheme in which the federal courts will sit as standing abortion review

committees, reviewing unconstitutional applications of statutes on a piecemeal basis. If women are prohibited from bringing pre-enforcement facial challenges to statutes restricting abortion, the Judiciary will be forced to grapple with an endless stream of "as-applied" challenges to those statutes.

While facial invalidation forces legislatures to repair facial defects in statutes, *barring* facial invalidation forces the *courts* to repair those facial defects one woman at a time. For example, if facial relief were not available for a statute requiring all second-trimester abortions to be performed in a general hospital, *cf. City of Akron*, 462 U.S. at 434-39, each woman seeking an abortion at a non-hospital facility would be forced to sue, alleging that this requirement, as applied to her, constituted a substantial obstacle (because of cost and lack of availability of hospital-based abortions, *see id.* at 434-35) and did not advance the state's interest in maternal health (because the specifics of her medical condition rendered an abortion at a non-hospital facility at least as safe, *see id.* at 435-37). Class-based relief would be difficult to fashion, and whether a particular woman is actually in the class(es) exempted from the statute would itself be subject to litigation.

D. *Casey*'s "Large Fraction" Analysis, along with its Rejection of the *Salerno* Standard, Is Not Limited to Spousal Notification Provisions.

Casey's "large fraction" analysis struck a careful balance between invalidating a statute on its face "based upon a worst-case analysis that may never occur," *see Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 515 (1991), and allowing a statute to stand that – it has been proven – will harm "many" women and is "likely to prevent a significant number of women from obtaining an abortion," *Casey*, 505 U.S. at 893. By applying the large fraction test, the Court assured itself that it was not overreaching, but was rather

invalidating only the restriction that posed serious risks of real harm to real women. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (discussing importance of "confin[ing] the Judicial Branch to its proper, limited role in the constitutional framework of Government").

The joint opinion's large fraction analysis was a response to the State's effort to minimize the burdens of the law by noting that many women would *not* be affected by the provision, essentially the same argument proffered by the State here.[9] The Court held that the fact that some women would *not* be harmed by the restriction did not warrant putting a "significant number" at risk by denying facial relief as the State advocated. *Casey*, 505 U.S. at 893. Simply put, the Court's continued willingness to strike this careful balance is necessary to protect women from restrictions that otherwise would, as outlined above, cause real harm.

The State and the United States now argue that *Casey*'s rejection of *Salerno* is tie[illegible]nly to the "large fraction" analysis and that the "large fraction" analysis — and thus the rejection of *Salerno* — is applicable only to the spousal notification provisions. (Pet. Br. at 36-37; U.S. Br. at 16-18.) This is incorrect and largely beside the point.

First, the Court's rejection of the *Salerno* standard in *Casey* was not limited to the invalidation of the spousal notification provision. The Court also did not apply *Salerno* in evaluating whether the medical emergency provision was inadequate, nor in its evaluation of the burdens imposed by the waiting period, even though both of those provisions clearly had some constitutional applications. *Supra* at 6-7. If the Court had applied *Salerno*, the rest of its explanation for

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[9] The State had argued that the spousal notification provision should be upheld because "it imposes almost no burden at all for the vast majority of women seeking abortions." 505 U.S. at 894.

upholding these provisions would have been completely unnecessary.

Second, the large fraction analysis itself is simply not limited to spousal notification provisions.[10] It was not discussed with regard to the waiting period in *Casey* because the Court held that the waiting period did not burden *any* women unduly.[11] A zero in the numerator makes any

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[10] *See Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, Circuit Justice) (in challenges to waiting period statutes in states other than Pennsylvania, courts should employ "large fraction" analysis); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (O'Connor, J., joined by Souter, J., concurring in denial of application to vacate stay) (lower court, in evaluating constitutionality of North Dakota statute requiring waiting period before abortion, should have applied "the same analysis" employed by joint opinion in *Casey*, specifically "large fraction" analysis; "we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'") (quoting *Casey*, 505 U.S. at 895) (alteration in original).

[11] The United States's claim that the joint opinion "expressly noted . . . that the same method of analysis would not apply to parental-notification and parental-consent provisions" (U.S. Br. at 17) (citing *Casey*, 505 U.S. at 895) is simply untrue. In the portion of the opinion that they cite, the Court distinguishes generally between spousal notice requirements imposed on adult women and parental notice and consent requirements imposed on "children." The distinction has nothing to do with the fraction of women being burdened; rather, as explained by the Court, the distinction is based on what the Court describes as its "quite reasonable assumption that minors will benefit from parental consultation," and its conclusion that a "parallel assumption" cannot be adopted with regard to adult women and their spouses. 505 U.S. at 895. In other words, it is not that parental involvement laws impose a substantial obstacle on a large fraction of the "children" involved and the Court does not care. Rather, it is that the Court does not believe that minors will be burdened as long as the alternative mechanism exists.

fraction zero no matter what the denominator.[12]

It is true that the "large fraction" analysis was not applied by the Court in evaluating whether the Pennsylvania Abortion Control Act at issue in *Casey* and the abortion method ban at issue in *Stenberg* adequately protected women's health.[13] In these cases, the Court has applied an alternative test and examined whether the restrictions "impose[] a *real* health risk." *See Casey*, 505 U.S. at 887 (emphasis added). While in *Casey*, the Court held that the lower court's interpretation of the medical emergency exception prevented that real risk, in *Stenberg* the Court held that "tragic health consequences" would result because the statute contained no exception whatsoever. *See Casey*, 505 U.S. at 880-81; *Stenberg*, 530 U.S. at 937-38.

Importantly, the State's claim that the "large fraction" analysis is limited to spousal notification provisions is also inconsistent with the stated goal of the joint opinion, to "set forth a standard of general application to which we intend to adhere." *Casey*, 505 U.S. at 876. The opinion speaks in general terms when it observes that "Legislation" — not spousal notification legislation — "is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . The proper focus of constitutional inquiry" — not constitutional inquiry regarding spousal notification — "is the group for whom the

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[12] In fact, the lower federal courts have appropriately used the "large fraction" analysis to adjudicate the constitutionality of abortion restrictions. *See, e.g., A Woman's Choice v. Newman*, 305 F.3d 684, 699 (7th Cir. 2002) (upholding waiting period after determining that it would not have "the direct effect of preventing a 'large fraction' of . . . women from obtaining abortions.").

[13] This is why the large fraction analysis is not mentioned by the Court in *Stenberg v. Carhart*, 530 U.S. 914, not because it is inapplicable to any other types of provisions. (*Cf.* Pet. Br. at 36-37; *see also* U.S. Br. at 16-17.)

law is a restriction, not the group for whom the law is irrelevant." 505 U.S. at 894.

II. Third-party Standing is Critical to the Protection of Women's Privacy Rights.

The United States seems to acknowledge the appropriateness of, as well as the necessity for, this Court's many decisions implicitly and explicitly recognizing that "abortion clinics and doctors who perform abortion 'routinely have *jus tertii* standing' to assert the rights of women whose access to abortion is restricted." (U.S. Br. at 15-16 (citing cases) (noting that such standing is available "to the extent that a woman may be deterred from bringing" a lawsuit to challenge restrictions on her right to abortion).)

The State, by contrast, takes a swipe at third party standing in this context, pointing to the uncontroversial premise that the federal courts' power to declare statutes unconstitutional lies in the "duty of those courts to decide cases and controversies properly before them" (Pet. Br. at 30) (quoting *United States v. Raines*, 362 U.S. 17, 20 (1960)), the rule that "gives rise to the rule barring third party standing." (*Id.*) The State ignores that, particularly in cases involving restrictions on privacy, including state regulations on women's access to safe, legal abortion procedures, this Court has endorsed the assertion of constitutional claims by parties other than those whose rights have been directly infringed. Disregarding the compelling reasons that the Court has identified for permitting third-party standing in the context of abortion litigation and elsewhere, the State asks the Court to jettison its decades-long jurisprudence.[14]

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[14] Notably, both the State and the United States acknowledge the importance of third party standing and rely on it in response to other objections. (*See* Pet. Br. at 41-42; U.S. Br. at 15-16.)

A. Acceptance of the State's Arguments Would Require the Court to Abandon Its Third-party Standing Doctrine.

Third-party standing to challenge statutory intrusions on privacy rights has a well-honored place in our constitutional jurisprudence. Eighty years ago, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), private and parochial schools were accorded standing to seek an injunction against enforcement of a state law in order to preserve the constitutional rights of parents who were not party to the suit. *Id.* at 536. As this Court later explained, in *Pierce*, "the schools were permitted to assert in defense of their property rights [the] constitutional rights of the parents and guardians." *Barrows v. Jackson*, 346 U.S. 249, 257 (1953).

Petitioner's heavy reliance on *United States v. Raines*, 362 U.S. 17 (1960), is misplaced. In *Raines*, the Court recognized that the rules it followed "are not principles ordained by the Constitution, but constitute rather 'rule[s] of practice,' . . . albeit weighty ones," *id.* (quoting *Barrows v. Jackson*, 346 U.S. 249), and acknowledged that third party standing was a proper exception to those rules. *Raines*, 362 U.S. at 22 (discussing proper "exceptions to [these rules] where there are weighty countervailing policies") (citing *NAACP v. Alabama*, 357 U.S. 449, 459-60 (1958)). Moreover, that was a case where defendants, local officials, attempted to avoid application of a civil rights statute, by arguing that the statute was unconstitutional because it could also be applied to private parties. The Court noted that "none of the countervailing considerations" justifying third party standing in other cases was present there. *Id.* at 23.

Barrows v. Jackson, of course, is one of this Court's earliest acknowledgments that there are indeed occasions when a party before the courts may assert the constitutional rights of persons not present. *Barrows*, 346 U.S. at 251, 259-60 (relationship between seller of property and purchasers "is

so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand."). In the years since *Barrows*, the Court has repeatedly reaffirmed the legitimacy of third-party standing to vindicate a variety of constitutional rights. *E.g.*, *Campbell v. Louisiana*, 523 U.S. 392, 397-400 (1998) (white defendant had standing to assert constitutional rights of Black jurors excluded from grand jury that issued indictment); *Powers v. Ohio*, 499 U.S. 400, 410-16 (1991) (white defendant had standing to assert constitutional claims of African-American persons excluded from petit jury service by racially discriminatory peremptory challenges); *Craig v. Boren*, 429 U.S. 190, 456-57 (1976) (beer vendor had third-party standing to assert constitutional rights of young males prohibited from purchasing beer under gender-based classification). As summarized in *Powers*, a litigant has the right to assert the constitutional rights of third parties when the litigant has "suffered injury in fact," has "a close relation to the third-party," and there "exist[s] some hindrance to the third-party's ability to protect his or her own interests." 499 U.S. at 411.

B. Third-party Standing Should Remain Available to Vindicate Women's Privacy Rights.

Based on the factors discussed above, the Court in *Singleton v. Wulff* determined that physicians have standing to assert the rights of women patients seeking abortions. First, the Court found that the closeness of the relationship between physician and patient "is patent." *Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976) (physicians who provide abortions have standing to assert privacy rights of women patients). A woman's exercise of her right to seek an abortion is "inextricably bound up with the activity" the physician seeks to pursue. *Id.* at 114. Second, the Court noted that there are several obstacles to the woman's

assertion of her own rights. *Id.* at 117. Due to privacy concerns, the woman might be chilled from asserting her own right to an abortion in a court case. *Id.* In addition, the time-sensitive nature of abortion means that the woman's claim would be subject to becoming moot rapidly. *Id.* Accordingly, the Court held that physicians could challenge an abortion funding restriction on behalf of their women patients. *Id.* at 118. *See also, e.g., Doe v. Bolton*, 410 U.S. at188 (1973) (physicians who provide abortion have standing to assert privacy rights of women patients); *City of Akron*, 462 U.S. at 440 n.30 (finding that physician plaintiff had standing to raise the claims of his minor patients); *Planned Parenthood of Cent. N. J. v. Farmer*, 220 F.3d 127, 147 (3rd Cir. 2000) (holding that physician had standing to assert constitutional rights of his patients seeking abortions); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 655 F.2d 848, 860 n.17 (8th Cir. 1981) (same), *aff'd in part & rev'd in part on other grounds*, 462 U.S. 476 (1983); *Charles v. Carey*, 627 F.2d 772, 779 n.10 (7th Cir. 1980) (same); *Greco v. Orange Mem'l Hosp. Corp.*, 513 F.2d 873, 875 (5th Cir. 1975) (same). For the same reasons, the courts of appeals and district courts that have directly addressed the issue have uniformly held that reproductive health care facilities also have standing to assert the rights of their women patients seeking abortion services. *See, e.g., Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 333 n.9 (5th Cir. Unit B 1981) (collecting cases); *Planned Parenthood of Minn. v. Citizens for Cmty. Action*, 558 F.2d 861, 865 n.3 (8th Cir. 1977); *Planned Parenthood Ass'n of the Atlanta Area v. Harris*, 670 F. Supp. 971, 981 n.14 (N.D. Ga. 1987) (collecting cases).

Indeed, the Court has consistently recognized third-party standing in other cases involving the right to privacy. *See Griswold v. Connecticut*, 381 U.S. 479, 481 (1965)

(Executive Director of Planned Parenthood and physician have standing to assert the privacy interests of married persons with whom they had professional relationship); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972) (advocate of rights of persons to obtain contraceptives has standing to assert the privacy rights of those persons to obtain contraceptives); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682-83 (1977) (mail order contraceptives vendor has standing to assert privacy rights of "potential customers"). That is due not only to the desire to protect the decision to abort from public scrutiny, as identified in *Singleton*, but also the desire to avoid the risk of violence that sometimes attends the exercise of the right to abortion in the United States. Persistent and wide-ranging incidents of violence, including assaults, bombings, blockades, butyric acid attacks, stalking, attempted murder and murder have plagued abortion providers and patients for three decades. That violence, some of which was the product of organized campaigns, moved Congress to enact criminal and civil remedies in the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248.[15] These risks often make even individual

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[15] *See* S. Rep. No. 103-117 (1993), 1993 WL 286699, at *3 - *11 (detailing murder, attempted murders, arson, bombings, firebombings, chemical attacks, other vandalism, clinic blockades and threats of force at abortion clinics); H.R. Rep. No. 103-306 (1993) *reprinted in* 1994 U.S.C.C.A.N. 699 (same). The National Abortion Federation ("NAF") has tabulated incidents of violence and disruption against abortion providers from 1977 through July 2005. NAF reports that there have been more than 4400 incidents of violence (e.g., murder, attempted murder, bombing, arson, acid attacks, assaults), more than 700 clinic blockades, and in excess of 100,000 incidents of disruption of activities (e.g., bomb threats, hate mail, harassing phone calls, suspicious packages) directed against abortion providers during that period. *See* NAF, *NAF Violence and Disruption Statistics, at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf (July 2005).

abortion providers hesitant to expose themselves by bringing a lawsuit and testifying on behalf of their patients.

Moreover, many women whose rights to privacy are most severely in jeopardy are unable to assert their rights. For example, the married woman who is regularly beaten by her husband may be unable to assert, even to her physician, the effects of a spousal notice statute on her, due to fear of reprisal.

The State's *amici* raise two additional arguments about the prudential limitations the Court has identified in third-party standing cases, relying upon *Tesmer v. Kowalski*, 543 U.S. 125, 125 S. Ct. 564 (2004). *See* Brief on N.H. Legislators as *Amicus Curiae* in Support of Petitioner ("N.H. Leg. Br."). First, they assert that physicians do not have the requisite "close relationship" with minors needing immediate abortions. (N.H. Leg. Br. at 15-16.) But, in *Tesmer* itself, the Court recognized that a sufficiently "close relationship" exists between a litigant and third-parties "when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Tesmer*, 125 S. Ct. at 567-68 (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975). This factor is obviously present here: it is the Respondents, and not their patients, against whom the parental consent statute would be enforced. This puts Respondents firmly in the same camp with the attorney who was accorded third-party standing to invoke the rights of his clients in *Department of Labor v. Triplett*, 494 U.S. 715 (1990), because he was subject to enforcement of the challenged statute regulating attorney's fees. *Id.* at 719-21. Indeed, a suit to vindicate women's privacy right to abortion is the paradigmatic case for third-party standing precisely because the physician and patient are both essential participants in the abortion decision as well as the implementation of that decision.

Second, relying on the same case, the legislators claim that minors face no hindrance to asserting their own interests in litigation, (*id.* at 17-19), arguing that young women can avoid the risk to their privacy rights that litigation threatens by bringing suit anonymously and that the possibility of mootness has been restricted by the doctrine of "capable of repetition, yet evading review." But both of those possibilities existed – and were remarked upon – when the Court decided *Singleton* and identified the loss of privacy and mootness as barriers to a woman's assertion of her own rights justifying a physician's third-party standing. The fact that, in a handful of reported federal cases challenging abortion restrictions, minors have participated anonymously (*see* N.H. Leg. Br. at 17 & n.2) hardly proves that most women, especially those in the throes of a medical crisis, will be undaunted by the prospect of commencing federal litigation to secure a constitutional right. *See supra* at n.5.

Finally, *amici*'s reliance on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), to argue that the plaintiffs do not have standing is also misplaced. (*See* N.H. Leg. Br. at 7-8.) The New Hampshire legislators cite *Lujan* for the uncontroversial proposition that past exposure to illegal conduct does not necessarily indicate a need for injunctive relief in the absence of a likelihood of recurrence or continuing adverse effects. 504 U.S. at 564 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). But in *Lujan*, the plaintiffs were using a "nexus" theory of standing by which they had claimed, *inter alia*, that they would suffer injury when they used portions of ecosystems *not affected* by the unlawful government action they challenged. 504 U.S. at 566. Moreover, the plaintiffs had failed to submit evidence that the adverse effects would actually occur again in the future. *Id.* at 564 & n.2. As Justice Kennedy notes in concurrence, the plaintiffs had not even claimed to have visited the unaffected sites since the unlawful activity began, nor had they shown that they would in fact return. *Id.* at 579-

80 (Kennedy, J. concurring). Thus, respondents had not "demonstrated a concrete injury." *Id.* (noting that even "nexus theory" of standing "in different circumstances" might support a claim to standing).

In this case, to the contrary, the injury is the very real threat of prosecution under a statute which Dr. Goldner has established he will need to violate to protect the health of his patients. Dr. Goldner is ready to provide emergency care to his patients whenever needed, and there is no genuine controversy that minors experience medical conditions that pose substantial risks of serious harm. That Dr. Goldner has not previously been prosecuted for providing abortions does not diminish the strength of his claim to relief from future prosecution under a law recently enacted. (*Cf* N.H. Leg. Br. at 9-11.)

CONCLUSION

For the foregoing reasons, the *amici* respectfully request that the Court uphold the lower court's decision and reject this effort to undermine constitutional protections for the right to choose abortion.

Respectfully submitted,

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APPENDIX
INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

ABORTION ACCESS PROJECT

The Abortion Access Project is an organization of activists and health care providers seeking to increase awareness of abortion as a critical part of comprehensive reproductive health services, address the shortage of abortion providers, and ensure access to abortion for all women.

AMERICAN JEWISH CONGRESS

The American Jewish Congress is an organization of American Jews dedicated to the protection of the civil liberties of American Jews and all Americans. It has long supported a woman's right to choose whether to carry a pregnancy to term, and has opposed unnecessary and unjustified state restrictions on the exercise of that right.

ASIAN COMMUNITIES FOR REPRODUCTIVE JUSTICE

Asian Communities for Reproductive Justice (ACRJ) works toward the advancement of reproductive justice for Asian women and girls. We believe reproductive justice will be achieved when women and girls have the economic, social, and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.

ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS

Founded in 1963, the Association of Reproductive Health Professionals (ARHP) is a non-profit membership association composed of highly qualified and committed experts in reproductive health. Its members are professionals who provide reproductive health services and education, conduct reproductive health research, and influence reproductive health policy, and they include physicians, advanced practice clinicians (nurse practitioners, nurse midwives, and physician assistants), researchers, educators, pharmacists, and other professionals in reproductive health. ARHP fosters research and advocacy to improve reproductive health, and educates health care professionals, policy makers, the media, and the public.

ATLANTA WOMEN'S MEDICAL CENTER

The Atlanta Women's Medical Center is a Georgia State Licensed Ambulatory Surgery Center and has been serving the Atlanta metropolitan area for forty years. The Center provides women of diverse background first and second trimester abortion care, and enables these women to avoid unsafe or illegal alternatives that could endanger their lives.

CALIFORNIA WOMEN LAWYERS

California Women Lawyers (CWL) is a non-profit, umbrella organization for women's bar associations throughout the state of California. Chartered in 1974, CWL serves as a network that permits California's women attorneys, judges, law professors and law students to work together to achieve common goals, including the protection of civil rights of all individuals. CWL actively engages in the public policy debate concerning the rights of women and children and

prepares or joins others in presenting amicus briefs in cases affecting constitutional rights, especially those that have a special impact on women and children.

CENTER FOR REPRODUCTIVE RIGHTS

The Center for Reproductive Rights (the Center) is a national public interest law firm based in New York City dedicated to preserving and expanding reproductive rights in the United States and throughout the world. The Center's domestic and international programs engage in litigation, policy analysis, legal research, and public education seeking to achieve women's equality in society and ensure that all women have access to appropriate and freely chosen reproductive health services, including contraceptives. The Domestic Legal Program of the Center specializes in litigating reproductive rights cases throughout the United States and is currently lead or co-counsel in a majority of the reproductive rights litigation in the nation.

CHERRY HILL WOMEN'S CENTER

The Cherry Hill Women's Center is a New Jersey State Licensed Ambulatory Surgery Center and has been serving the communities of Southern New Jersey for over twenty-five years. The Center provides women of diverse background first and second trimester abortion care, and enables these women to avoid unsafe or illegal alternatives that could endanger their lives.

CHOICE USA

Choice USA mobilizes and provides ongoing support to the diverse, upcoming generation of leaders who promote and protect reproductive choice both now and in the future. We

are dedicated to the right of each person worldwide to decide when and if they will have sex, when and if they will be pregnant, and when and if they will have a child. In order to make those personal decisions, accurate information and safe, legal reproductive health services must be available to everyone.

FAMILY PLANNING ASSOCIATION OF MAINE

Founded 35 years ago as a private not-for-profit, the Family Planning Association of Maine (FPA) is a statewide organization that serves as the Title X/National Family Planning program grantee for the state of Maine, administers all state funds supporting contraceptive care for 34,000 low-income Maine women and teens. Through four sites, the FPA directly oversees services for 4,500 low-income patients and contracts for similar services through six delegate agencies for services to 28,500 women and teens. In addition, the Association provides first-trimester abortion services in Central and Southern Maine and operates the only site available for training physicians and residents interested in learning how to provide the service. The FPA also provides women's health orientation opportunities to medical students at the University of New England, the state's only medical school.

GUTTMACHER INSTITUTE

The Guttmacher Institute is an independent, nonprofit corporation that advances sexual and reproductive health in the United States and around the world through an interrelated program of research, policy analysis and public education. The Institute works to protect, expand and equalize access to information, services and rights that will enable women and men to avoid unplanned pregnancies, prevent and treat sexually transmitted infections, including

HIV, exercise the right to choose abortion, achieve healthy pregnancies and births and have healthy, satisfying sexual relationships.

HARTFORD GYN CENTER

The Hartford GYN Center is a Connecticut State Licensed Family Planning and Abortion Clinic. The Center has been serving the community in the Hartford area and beyond for over twenty years. The Center provides women of diverse background first and second trimester abortion care, and enables these women to avoid unsafe or illegal alternatives that could endanger their lives. The Center also provides routine gynecological care.

INSTITUTE FOR REPRODUCTIVE HEALTH ACCESS

The Institute for Reproductive Health Access works on increasing access to comprehensive reproductive health services. The Institute works across the nation to partner with state-based organizations to address obstacles women face when seeking to obtain family planning services, abortion care and other health care services.

LAW STUDENTS FOR CHOICE

Law Students for Choice represents over 1500 law students across the country working to increase curricula and professional training in reproductive rights law and advocacy on legal campuses nationwide. Law Students for Choice works on a grassroots basis at law schools in both the United States and Canada, sponsors national and regional educational events, provides internships in reproductive rights and the law, maintains a presence on the Internet, and

publishes a quarterly newsletter. Law Students for Choice is committed to educating, organizing, and supporting pro-choice law students to ensure that emerging legal advocates have the skills they need to successfully defend and expand reproductive rights.

MADRE

MADRE, a United States-based international women's human rights organization, has been working to defend the reproductive health and freedom of women around the world since 1983. Our 23,000 members in the United States and abroad support our understanding that any restriction on women's access to safe and legal abortion will be devastating to women's equality, health, and freedom. MADRE supports all efforts to defend reproductive health and rights as women's human rights.

MEDICAL STUDENTS FOR CHOICE

Medical Students for Choice represents almost 10,000 medical students and residents who are demanding a comprehensive medical education that includes abortion training. Medical Students for Choice works on a grassroots basis at medical schools and residency programs throughout North America, sponsors national and regional educational meetings, provides reproductive health clinical training externships, maintains a presence on the Internet, and publishes a quarterly newsletter. Medical Students for Choice is committed to ensuring that medical practitioners are prepared to provide their patients with the full range of reproductive health care choices.

NATIONAL ABORTION FEDERATION

The National Abortion Federation (NAF), a non-profit organization founded in 1977, is the professional association of abortion providers in North America. Its members include over 400 non-profit and private clinics, women's health centers, hospitals, and private physicians' offices in 47 states. NAF's members care for over half of the women who choose abortion each year in the United States, including minor patients facing health emergencies.

NATIONAL ASSOCIATION OF WOMEN LAWYERS

The National Association of Women Lawyers (NAWL), headquartered in Chicago, is more than 100 years old. It was the first and is the oldest women's bar association in the United States. Its members consist of individuals as well as professional associations. Part of NAWL's mission is to promote the welfare of women, children, and families in all aspects of society. Among NAWL's interests are economic justice, reproductive rights, and equal protection. NAWL supports equality for women and girls so that they may achieve their full potential. Given its interest in issues affecting women and families as a class, NAWL has participated as an *Amicus Curiae* in many courts of the United States, including the United States Supreme Court.

NATIONAL COALITION OF ABORTION PROVIDERS

The National Coalition of Abortion Providers (NCAP) is a nonprofit organization dedicated to helping our member clinics better meet the needs of their communities. Since 1990, NCAP has represented the political, business, and networking needs of nearly 150 independent abortion providers throughout the country. NCAP advocates for the

supportive relationship between providers and the women and men they serve. NCAP members have been innovative leaders in providing quality medical care. Abortion is one of the safest procedures performed today because of their skills, commitment, and understanding.

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION

The National Family Planning & Reproductive Health Association (NFPRHA) works to assure access to voluntary family planning and reproductive health care services and to support reproductive freedom for all. A national non-profit membership organization, NFPRHA represents clinicians, administrators, researchers, educators, advocates and providers in the family planning field who provide reproductive health care services at nearly 4,500 clinics to more than 5 million women annually.

NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH

The National Latina Institute for Reproductive Health (NLIRH) was founded in 1994 to empower Latinas to make informed reproductive health decisions. Latinas comprise an increasing percentage of women of reproductive age (15-49) in the continental United States, and Latinos are quickly becoming the nation's largest minority population. NLIRH's areas of programmatic focus include coalition building, education, communication, public policy, and advocacy.

NATIONAL NETWORK OF ABORTION FUNDS

The National Network of Abortion Funds (NNAF), a non-profit organization, is an affiliation of abortion funds

operating throughout the United States. The mission of NNAF is (1) to promote direct financial support for abortions to low-income women -- adults and minors – nationwide; and (2) to conduct grassroots and national organizing, advocacy, public education and policy work to ensure that those most in need -- low-income women, women of color, and young women -- have access to abortion and other basic reproductive health care.

NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES

The National Partnership for Women & Families is a non-partisan, non-profit advocacy group founded in 1971 that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership firmly believes that quality health care must include access to the full range of women's reproductive health services. As a result, the National Partnership has a long history of promoting and defending a woman's right to choose by filing amicus curiae briefs in major reproductive rights and health cases.

NATIONAL WOMEN'S LAW CENTER

The National Women's Law Center is a nonprofit legal advocacy organization that has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. The fundamental right to abortion recognized in Roe v. Wade is of profound importance to the lives, health, and safety of women throughout the country. Because of the tremendous significance to women of the freedom to choose

whether to bear children, the National Women's Law Center seeks to preserve women's right to abortion.

NATIVE AMERICAN WOMEN'S HEALTH EDUCATION RESOURCE CENTER

The Native American Women's Health Education Resource Center (NAWHERC) works to improve the lives of Indigenous women by addressing their health, environmental, educational, and cultural rights, locally, nationally, and internationally. The traditional beliefs of Indigenous women include the belief "that the business of women is determined by women for women." Since its founding over fifteen years ago, NAWHERC has supported reproductive rights.

NORTHEAST WOMEN'S CENTER

The Northeast Women's Center is a Pennsylvania State Licensed Abortion Clinic and has been serving the community in the northeast section of Philadelphia for over twenty-five years. The Center provides women of diverse background first and second trimester abortion care, and enables these women to avoid unsafe or illegal alternatives that could endanger their lives.

PHILADELPHIA WOMEN'S CENTER

The Philadelphia Women's Center is a Pennsylvania State Licensed Abortion Clinic and has been serving the Philadelphia community since 1972. The Center provides women of diverse background first and second trimester abortion care, and enables these women to avoid unsafe or illegal alternatives that could endanger their lives.

PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH

Physicians for Reproductive Choice and Health (PRCH) is a national, physician-led, non-profit organization founded in 1992. PRCH represents more than 3,500 physicians of various disciplines, and non-physician supporters. PRCH's mission is to enable concerned physicians to take a more active and visible role in support of voluntary universal reproductive healthcare. PRCH is committed to ensuring that all people have the knowledge, equal access to quality services, and freedom of choice to make their own reproductive health care decisions.

PROKANDO

ProKanDo is a pro-woman, pro-choice political organization based in Kansas. We seek out, promote and raise money to support pro-choice candidates who are willing to serve at the state level and eventually at the national level. Additionally, we educate voters about candidates so they can make informed voting decisions that will protect their reproductive freedom. During the legislative session, ProKanDo lobbies the state legislature in support of bills that protect the reproductive rights of women, while working to defeat any harmful legislation that would potentially turn back the clock on women's rights.

SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES

The Sexuality Information and Education Council of the United States (SIECUS) is a non-profit organization that has served as the national voice for social justice, sexual health and sexual rights for over forty years. SIECUS affirms that sexuality is a fundamental part of being human, one that is

worthy of dignity and respect and advocates for the right of all people to accurate information, comprehensive education about sexuality, and sexual health services.

WOMEN LAWYERS ASSOCIATION OF LOS ANGELES

Women Lawyers Association of Los Angeles (WLALA) is a nonprofit organization composed primarily of attorneys and judges in Los Angeles County. Founded in 1919, WLALA is dedicated to promoting the full participation of women lawyers and judges in the legal profession, maintaining the integrity of our legal system by advocating principles of fairness and equality, and improving the status of women in our society. WLALA places a high priority on preserving personal choice in abortion decisions. To further these goals, WLALA has joined amicus briefs in cases having a significant impact on women's rights. For example, in Catholic Charities v. Superior Court, WLALA joined in successfully urging the California Supreme Court to apply the Women's Contraceptive Pay Equity Act, which mandates that group and individual health insurance policies that include prescription drug benefits also include coverage for prescription contraceptives, to an employer like Catholic Charities.

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Supreme Court of the United States

KELLY A. AYOTTE,
Attorney General of New Hampshire,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

BRIEF OF THE HONORABLE JOHN H. LYNCH GOVERNOR OF THE STATE OF NEW HAMPSHIRE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS[1]

Governor John H. Lynch has served as Governor of the State of New Hampshire since January 6, 2005. As Governor, he has the responsibility to ensure that all New Hampshire citizens, particularly the most vulnerable, have access to quality health care. The Governor must strive to protect the integrity of the process by which highly trained professionals deliver health care services in New Hampshire. The Governor has an interest in assuring that physicians in New Hampshire are allowed to exercise their good faith medical judgment in preserving the life and health of their patients without being subject to criminal sanctions.

SUMMARY OF ARGUMENT

New Hampshire has a proud tradition of providing for the medical needs of its citizenry, including young women.[2] Just as the Hippocratic Oath commands physicians, "First, do no harm," the State of New Hampshire must first ensure that it does not create legal impediments that prevent physicians from continuing to provide quality

[1] Amicus Curiae file this brief by consent of the parties, and copies of the letters of consent are on file with the Clerk of the Court. Counsel for Amicus Curiae authored this brief in its entirety. No person or entity, other than the Amicus Curiae, has made a monetary contribution to the preparation or submission of this brief.

[2] New Hampshire has been cited as having one of the lowest teenage pregnancy rates in the nation, ranking 48th. *See*, The Alan Guttmacher Institute, U.S. Teenage Pregnancy Statistics: Overall Trends, Trends by Race and Ethnicity and State-by-State Information, Table 2, http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf (updated Feb. 19, 2004).

health care to all citizens. The New Hampshire Parental Notification Prior To Abortion Act (the "Parental Notification Act" or the "Act")[3] creates such impediments.

The Act interferes with the long-established practice in New Hampshire that allows a physician to act without delay in an emergency situation to save the life or health of a patient. The Act imposes criminal penalties on a physician who, without prior parental notification, acts in an emergency to preserve the health of a minor. Even a physician who attempts a *life*-saving abortion is not spared from criminal liability under the Act unless the physician can attest to a medical certainty that the patient will die if the abortion is not performed within the time it takes to comply with the Act's notice requirements.[4] Imposing such a heavy personal burden on physicians will result in reduced access to health care for young women. Imposing prohibitions on and delays in emergency treatment creates the risk of permanent impairment or death to patients.

The judicial bypass procedure set forth in the Act, N.H. Rev. Stat. Ann. §132:26, II, does not serve as a substitute for the sort of health exception mandated by this Court in the context of an abortion.[5] Emergency health procedures are just that: emergencies. Often split-second decisions must be made by physicians to preserve the health of the patient.

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[3] N.H. Rev. Stat. Ann. §§132:24-28.

[4] N.H. Rev. Stat. Ann. §132:26, I(a) provides that no notice to the parent is required if: "[t]he attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice."

[5] *See Planned Parenthood v. Casey*, 505 U.S. 833, 846, 879-80 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000).

Despite the stated intention of the Act to provide for judges to be available on an around-the-clock basis, our state's judiciary is simply not equipped to serve as an emergency medical second-opinion in abortion cases. A young woman will be hard-pressed to convene a judicial hearing to provide "immediate relief" as argued by Petitioner in her Brief.[6] As a practical matter, the court system is not able to play the role ascribed to it by the Attorney General.

ARGUMENT

I. New Hampshire's Parental Notification Act Reverses the Long-Established Presumption in New Hampshire that a Physician May Act Without Delay in an Emergency Situation to Save the Life or Health of a Patient

The Parental Notification Act prevents a minor from obtaining an abortion unless her parent has been notified at least forty-eight (48) hours in advance of the abortion; the parent certified that he or she received notice; or the young woman has been granted a waiver pursuant to a judicial bypass mechanism provided in the Act. The Act contains no emergency health exception to the parental notice requirement. The Act, therefore, defies a well-established practice in New Hampshire of permitting health care practitioners to act without delay in emergency situations (even without the consent of the patient or the patient's authorized representative) to protect the health of their patients. In fact, the Act renders criminally liable a physician who, without at least 48-hours advance notification to

[6] Petitioner's Brief, p. 21.

the patient's parent, performs an abortion that the physician believes is necessary to prevent harm (e.g., kidney failure, infertility) to the health of the patient.

Under the Act, the physician is prevented from performing even life-saving abortions unless the physician can certify to a certainty that the minor will die within the time it takes to comply with the Act's notice requirements and that the abortion is "necessary" to prevent death. In this respect the Act attempts to convert medicine from an art to a science by requiring precision and certitude that is unattainable in the medical profession. The sanction for a misstep by the physician is severe: a criminal penalty.

The general emergency implied consent doctrine in New Hampshire is derived not from legislative enactment but from common practice and common law.[7] A generally accepted practical and common sense exception to New Hampshire's informed consent laws, it allows physicians to act without express consent in order to save the life or health of the patient. Although no single New Hampshire statute or case encapsulates this general emergency doctrine, its existence has been acknowledged and embraced by the legislature. *See, e.g.*, N.H. Rev. Stat. Ann.

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[7] *See, e.g., Luka v. Lowrie*, 136 N.W. 1106 (Mich. 1912) ("To hold that a surgeon must wait until perhaps he may be able to secure the consent of the parents before giving to the injured one the benefit of his skill and learning, to the end that life may be preserved, would, we believe, result in the loss of many lives which might otherwise be saved); *Jackovach v. Yocom*, 237 N.W. 444 (Iowa 1931) ("If the surgeon, confronted by an emergency, is not to be permitted, after having fairly and carefully examined the situation, to exercise his professional judgment in his honest endeavor to save human life, then the public at large must suffer"); *Tabor v. Scobee*, 254 S.W. 2d 474 (Ky. 1951) (recognizing "emergency exception" doctrine).

§507-E:2, II(a) (articulating the elements of a cause of action for negligent failure to give informed consent and specifically excluding from its parameters those circumstances in which the physician "acted in an emergency situation"). Other New Hampshire statutes identify specific circumstances in which a physician may act without consent in an emergency to preserve the life or health of a patient.[8]

The Parental Notification Act overrides common law and common sense. The Act reverses the long-standing presumption that a physician may act without delay in an emergency to preserve the life or health of a patient. The Act's inclusion of a death exception and its glaring omission of any emergency health exception makes it impossible for state courts to infer an emergency health exception.[9] Moreover, even the emergency death exception in the Act is limited, requiring the physician to attest with certainty that if an abortion is not performed within the 48-hour notification period, death to the patient will result. The combination of the high burden of proof and the high stakes to a physician places at risk the very health and life of the young patient.

In an effort to save the Act from constitutional infirmity, the Attorney General argued in the lower court that

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[8] *See, e.g.*, N.H. Rev. Stat. Ann. §153-A (addressing the delivery of emergency medical and trauma services initiated at the scene of an incident); N.H. Rev. Stat. Ann. §627:6, VII(b) (allowing a health care practitioner to use force in certain circumstances when administering treatment during a medical emergency).

[9] "The expression of one thing in a statute implies the exclusion of another." *St. Joseph Hosp. of Nashua v. Rizzo*, 141 N.H. 9, 11-12, 676 A.2d 98, 100 (1996).

this Court can, if necessary, read an emergency health exception into the Act. The Attorney General posited that certain other New Hampshire statutes, when read with the Act, authorize a physician to provide medical treatment to a pregnant minor in the case of a medical emergency.[10] Unfortunately, none of the three statutes cited by the Attorney General applies to the situation addressed by the Act: (1) N.H. Rev. Stat. Ann. §153-A addresses the rendering of "emergency medical services" by EMTs or "any other health professional" in the *pre-hospital* setting, *e.g.*, treatment at the scene of an accident or a curbside setting; (2) N.H. Rev. Stat. Ann. §627:6, VII(b) allows a health care practitioner to use force in certain circumstances when administering treatment during a medical emergency; and (3) N.H. Rev. Stat. Ann. §627:3, I is a general criminal statute addressing "competing harms" that does not purport to address emergency health exceptions, or health care at all.

The Attorney General's reliance on the two criminal statutes cited above highlights one of the most insidious ramifications of the Act: the application of the heavy hand of criminal law to the good faith exercise of professional medical judgment. This radical new approach to our health care delivery system threatens to interfere with the competent and safe delivery of health care services in New Hampshire.

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[10] *See Planned Parenthood v. Heed*, 390 F.3d 53, 61 (1st Cir. 2004). Note that the Attorney General has abandoned this line of argument in this Court.

II. The Act Subjects Well-Intentioned Physicians to Criminal Penalties, Thereby Undermining the Sanctity of the Physician-Patient Relationship in New Hampshire and Creating a Chilling Effect on Access to Health Care in New Hampshire

New Hampshire has a long tradition of respecting the sanctity of the physician-patient relationship.[11] By criminalizing the behavior of physicians who exercise their professional judgment in attempting to protect the health of their patients, the Act will have the effect of changing the health care landscape in New Hampshire.

The Parental Notification Act has the potential to reduce access to health care services for patients in New Hampshire and to change the nature of the services rendered. At present, only a small number of physicians are willing to perform abortions on minors. Faced with criminal sanctions for even good faith decisions regarding emergency procedures, it is likely that even fewer physicians will be willing to continue to provide these services. Those who continue to accept young patients seeking abortions will inevitably approach their decision making in a different manner. Given the high stakes of criminal liability, they will no longer be concerned about just the risks to their patients, but will understandably be concerned about their own careers and their own personal liberties. In a small state, the already small percentage of providers could be dramatically reduced.

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[11] *State v. Elwell*, 132 N.H. 599, 567 A.2d 1002 (1989); *Nelson v. Lewis*, 130 N.H. 106, 534 A.2d 720 (1987).

III. The Judicial Bypass Procedure Provided in the Act Does Not Serve as a Substitute for a Health Exception

The Parental Notification Act provides that in lieu of the 48-hour parental notice provision, a minor woman may seek a waiver from a judge pursuant to a "judicial bypass provision." Under the Act, access to the lower and appellate courts must be available "24 hours a day, 7 days a week,"[12] and according to the Attorney General, "access to a judge can be almost immediate"[13] for the granting of a judicial waiver.

New Hampshire boasts a judiciary which is both competent and responsive. But as a practical matter, neither our courts – nor indeed the courts of any state – have the resources to provide a thoughtful second opinion in a medical emergency on a moment's notice. The way in which this Act will be administered in the real world is at the heart of this constitutional issue. As this Court held in the case of *Planned Parenthood v. Casey*, the government may not "interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[14]

In her Brief to the Court, the Attorney General analogizes the Act's judicial bypass procedure to a search warrant procedure. This is a revealingly inapt analogy. A petition to a court seeking a judicial bypass waiver due to a health exception calls for a far more complicated and time consuming review than an application for the issuance of a

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[12] N.H. Rev. Stat. Ann. §132:26, II(c).

[13] Petitioner's Brief at p. 22.

[14] *Planned Parenthood v. Casey*, 505 U.S. 833, 879-80 (1992).

search warrant. Given the number and frequency of applications for search warrants, New Hampshire law enforcement has established a relatively seamless procedure for gaining swift access to judges. The application for a search warrant requires only a showing of probable cause, which lies in the hands of the police. The police have an established relationship with the prosecutors, who in turn, have an established relationship with the judges. In fact, the police and prosecutors typically have the home telephone number of the judge.

A young woman facing a medical emergency and seeking to invoke the Act's judicial bypass procedure hardly has a judge's home telephone number at her fingertips. Nor is it likely that she even has an attorney's telephone number. And, if she is in the throes of a health emergency, she will be hard-pressed to marshal the physical energy and focus to gain access to a judge on an "almost immediate" basis.

Even if the young woman has a health care provider willing to press her case, it is unlikely, for the reasons set forth below, that she could gain "almost immediate" access to a judge. Just as importantly, it is unreasonable to assume that the judge could render an immediate decision on whether the abortion is in the "best interests" of the young woman.[15] The following list includes only the most basic steps to comply with the required procedural safeguards of the Parental Notification Act.

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[15] It is telling that the Act itself calls for a maximum time limit of seven days – not minutes or hours – for a decision by the lower court, together with another seven days for a decision by the appellate court. N.H. Rev. Stat. Ann. §§132:26, II(b)-(c).

1. Under the Act, the young woman has a right to court-appointed counsel.[16] Even during business hours, it takes time to locate an attorney who is immediately available to meet with the client and to commence the court filings;

2. Under the Act, the judge determines whether the young woman is "mature and capable of giving informed consent,"[17] which would appear to require an assessment by the judge of the young woman's demeanor;

3. The Act provides that the judge "may choose to appoint a guardian ad litem for the young woman."[18] Even assuming that the emergency occurs during business hours, it takes time to locate guardians ad litem who can make themselves immediately available to meet with the patient and her health care professionals, review the patient's medical record, and prepare a report to the judge regarding the "best interests" of the young woman;

4. The judge will likely require testimony or affidavits from physicians treating the young woman regarding the health issues involved, given that the precipitating reason for the judicial bypass hearing is the patient's emergency medical condition;

5. The judge will likely want to examine a certified copy of the medical record at issue. During business hours, a physician or hospital can promptly produce a certified medical record from the keeper of the medical records but

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[16] N.H. Rev. Stat. Ann. §132:26, II(a).

[17] N.H. Rev. Stat. Ann. §132:26, II.

[18] *Id.*

outside of business hours this document will be much more difficult to obtain;

6. The Act calls for "an appropriate hearing" to be held.[19] The court will likely schedule an expedited hearing, either in the courtroom or at the patient's bedside, at which the judge may wish to elicit testimony from the young patient (if capacitated), her physician, and others who can offer pertinent information for the court to make a determination as to whether the abortion is in the "best interests"[20] of the young woman; and

7. The judge who hears this non-routine medical case will rightfully expect to familiarize himself or herself with the facts and law before rendering a decision in the case.

In sum, it is unlikely that a young, pregnant woman with an emergency health condition – with or without assistance from her health care provider – could navigate the medical and legal terrain in a manner that would allow her to obtain "almost immediate" access to a judge. This is especially so if her medical emergency arises after business hours and in the middle of the night. Once a judge is found, it seems reasonable to expect that the judge will need to take the time to gather pertinent evidence to ascertain whether it is indeed in the "best interests" of the young woman to proceed with an abortion.

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[19] *Id.*

[20] N.H. Rev. Stat. Ann. §132:26, II(a).

CONCLUSION

This case is not a referendum on whether parents should usually be involved in decisions related to medical care for their minor children. There are few who would dispute that in the best of worlds parental guidance is desirable. Rather, this case involves that small percentage of situations in which, for one reason or another, parental involvement is not available and in which the treating physician has determined that continuation of the pregnancy creates serious health risks or even the risk of death to the young woman. These are precisely the conditions under which this Court has ruled that states must exercise caution. These are also the circumstances under which leaders of a state must take steps to safeguard the life and health of its citizens.

For the foregoing reasons, Amicus Curiae, the Governor of the State of New Hampshire, respectfully requests this Honorable Court to affirm the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* NARAL PRO-CHOICE AMERICA FOUNDATION, ET AL., IN SUPPORT OF RESPONDENTS

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Glick v. McKay,
No. CV-N-85-331-ECR (D. Nev. Oct. 10, 1991) 12
Gregory v. State,
369 A.2d 181 (N.H. 1977) 13
Guam Soc'y of Obstetricians & Gynecologists v. Ada,
962 F.2d 1366 (9th Cir. 1991) 23
Harris v. McRae,
448 U.S. 297 (1980) 22
Heckler v. Matthews,
465 U.S. 728 (1984) 13
I.N.S. v. Cardozo-Fonseca,
480 U.S. 421 (1987) 7
In re CNA Ins. Cos.,
722 A.2d 496 (N.H. 1998) 13

In re Jerome,
843 A.2d 325 (N.H. 2004) 13
Jane L. v. Bangerter,
809 F. Supp. 865 (D. Utah 1992) 23
National Abortion Federation v. Ashcroft,
330 F. Supp. 2d 436 (S.D.N.Y. 2004), *appeal pending*, No. 04-5201 (2d Cir. filed Sept. 29, 2004) 24
Northland Family Planning Clinic v. Cox, No. 2:05-cv-70779 (E.D. Mich. Sept. 12, 2005) 23
Osborne v. Ohio,
495 U.S. 103 (1990) 27
Planned Parenthood Federation of America v. Ashcroft,
320 F. Supp. 2d 957 (N.D. Cal. 2004), *appeal pending*, No. 04-16621 (9th Cir. filed Aug. 20, 2004) 24
Planned Parenthood of Central Missouri v. Danforth,
428 U.S. 52 (1976) 22, 23
Planned Parenthood of Idaho, Inc. v. Wasden,
376 F.3d 908 (9th Cir. 2004) 6
Planned Parenthood of N. New England v. Heed,
296 F. Supp. 2d 59 (D.N.H. 2003), *aff'd*, 390 F.3d 53, 61 (1st Cir. 2004) 11
Planned Parenthood of S. Arizona v. Neely,
804 F. Supp. 1210 (D. Ariz. 1992) 6
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S 833 (1992) 2, 5, 10, 23
Planned Parenthood of the Rocky Mountain Services Corp. v. Owens,
287 F.3d 910 (10th Cir. 2002) 6, 11
Progressive N. Ins. Co. v. Enterprise Rent-A-Car,
821 A.2d 991 (N.H. 2003) 13
Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 27
Richmond Medical Center for Women v. Hicks,
409 F.3d 619 (4th Cir. 2005) 24

Robinson v. Shell Oil Co.,
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Roe v. Wade,
410 U.S. 113 (1973) 3, 4-5, 10, 23, 28
Salinas v. United States,
522 U.S. 52 (1997) 12-13
Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 12
Sojourner T. v. Edwards,
974 F.2d 27 (5th Cir. 1992) 23
State v. Kidder,
843 A.2d 312 (N.H. 2004) 13
Stenberg v. Carhart,
530 U.S. 914 (2000) 6, 23
Tafflin v. Levitt,
493 U.S. 455 (1990) 19
Tanner v. United States,
483 U.S. 107 (1987) 7
Thornburg v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 5
United States v. Albertini,
472 U.S. 675 (1985) 13
United States v. Locke,
471 U.S. 84 (1985) 13
United States v. Nat'l Treasury Employees Union,
513 U.S. 454 (1995) 19
United States v. Reese,
92 U.S. 214 (1875) 27
United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 7
United States v. Ron Pair Enter., Inc.,
489 U.S. 235 (1989) 7
Utah Women's Clinic v. Walker,
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Virginia v. Am. Booksellers Ass'n,
484 U.S. 383 (1988) 18

Webster v. Reproductive Health Services,
429 U.S. 490 (1989) 23

CONSTITUTIONS

N.H. Const. p.2 Arts. 9, 25 19
U.S. Const. art. I, § 1 13

STATUTES

18 U.S.C. § 1531 24
Ala. Code § 26-21-3 14
Ala. Code § 26-21-5 16
Ariz. Rev. Stat. § 36-2152 ..... 14, 15
Ark. Code Ann. §§ 20-16-801 *et seq.* 14
Ark. Code Ann. §§ 20-16-802, 805 15
Cal. Health & Safety Code § 123450(a) 17
Colo. Rev. Stat. §§ 12-37.5-103(5), 105 15
Colo. Rev. Stat. § 12-37.5-104 14
Colo. Rev. Stat. Ann. §§ 12-37.5-101, 102 11
Colo. Rev. Stat. Ann. §§ 12-37.5-103-107 11
Del. Code Ann. tit. 24 § 1782(d) 15
Del. Code Ann. tit. 24 § 1783 14-15
Del. Code Ann. tit. 24 § 1787 15
Fla. Stat. Ann. § 390.01114 ..... 14, 15
Ga. Code Ann. § 15-11-112 14
Ga. Code Ann. § 15-11-116 16
9 Guam Code Ann. §§ 31.20-23 22
Idaho Code § 18-604 15
735 Ill. Comp. Stat. Ann. 5/11-107.1 23
750 Ill. Comp. Stat. § 70/10 15
Ind. Code § 16-34-2-4(i) 16
Ind. Code Ann. § 16-34-2-4 14
Iowa Code Ann. §§ 135L.1, *et seq.* 15
Iowa Code Ann. § 135L.3 14
Kan. Stat. Ann. § 65-6705 14
Kan. Stat. Ann. § 65-6705(j)(1)(B) 16

Ky. Rev. Stat. §§ 311.720(12), 732(8) 15
Ky. Rev. Stat. Ann. § 311.732 14
Ky. Rev. Stat. Ann. § 311.735 23
La. Rev. Stat. Ann. §14:87 23
La. Rev. Stat. Ann. § 40:1299.35.5 14
La. Rev. Stat. § 40:1299.35.12 16
Md. Code Ann. § 20-103 15
Mass. Gen. Laws Ann. ch. 112, § 12S 14
Mass. Gen. Laws ch. 112 § 125 17
Me. Rev. Stat. Ann. tit. 22 § 1597-A 15
Mich. Comp. Laws §§ 722.902(b), 905 15
Mich. Comp. Laws Ann. § 33.1081-1085 23
Mich. Comp. Laws Ann. § 722.903 14
Minn. Stat. Ann. § 144.343 14
Miss. Code Ann. § 41-41-53 14
Miss. Code § 41-41-57 16
Mo. Ann. Stat. § 188.028 14
Mont. Code Ann. §§ 50-20-203(5), 50-20-208 15
N.C. Gen. Stat. Ann. § 90-21.7 14
N.C. Gen. Stat. § 90-21.9 16
N.D. Cent. Code § 14-02.1-03 14
N.D. Cent. Code §§ 14-02.1-03(1), (12) 15
N.H. Rev. Stat. Ann. §§ 132:24-28 ..... 2, 29
N.J. Stat. Ann. §§ 9:17A-1.3, 1.6 15
N.M. Stat. Ann. § 30-5-1(C) 16
Neb. Rev. Stat. § 71-6902 14
Neb. Rev. Stat. § 71-6906 16
Nev. Rev. Stat. § 442.255 16
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Ohio Rev. Code Ann. § 2919.151 24
Okla. Stat. tit. 63, § 1-740.2 15
Okla. Stat. Ann. tit. 63, § 1-740.2 14
18 Pa. Cons. Stat. Ann. § 3203 15
18 Pa. Cons. Stat. Ann. § 3206 ..... 14, 15
18 Pa. Cons. Stat. Ann. § 3209 23
R.I. Gen. Laws § 23-4.7-4 17
R.I. Gen. Laws § 23-4.7-6 14

R.I. Gen. Laws Ann. §§ 23-4.8-1 to 4.8-5 23
S.C. Code Ann. § 44-41-30(C) 16
S.C. Code Ann. § 44-41-31 14
S.D. Codified Laws § 34-23A-7 14
Tenn. Code Ann. § 37-10-303 14
Tenn. Code Ann. § 37-10-305 16
Tex. Fam. Code Ann. §§ 33.001, 004 15
Tex. Occ. Code Ann. § 164.052 14
Tex. Occ. Code Ann. §§ 164/052 (a)(19) 15
Utah Code Ann. §§ 76-7-301, 305 15
Utah Code Ann. §§ 76-7-301(3), 310.5, 314, 326-330 24
Utah Code Ann. § 76-7-304 14
Utah Code Ann. § 76-7-314 23
Va. Code Ann. § 16.1-241 14
Va. Code Ann. § 18.2-71.1 24
Va. Code Ann. § 18.2-76 15
W. Va. Code Ann. § 16-2F-3 14
W. Va. Code Ann. § 16-2F-5 16
Wis. Stat. § 48.375(4) 16
Wis. Stat. Ann. § 48.375 14
Wyo. Stat. Ann. § 35-6-118 14

LEGISLATIVE MATERIALS

Hyde Amendment, Pub. L. 96-86 § 109, 93 Stat. 926 (1979) 22
H.B. 03-1376, 64th Gen. Assembly, Gen. Sess. (Colo. 2003) 11
S.B. 419 79th Leg. (Tex. 2005) 15
S.D. S.B. 193, 80th Leg. Sess., Reg. Sess. (S.D. 2005) 15

PUBLICATIONS

Abortion Law Was Dangerous, PORTSMOUTH HERALD, Dec. 31, 2003, *available at* ttp://www.seacoastonline.com/2003news/12312003/opinion/68065.htm 8

Dan Gorenstein, Court Takes Up State's Parental Notification Law, New Hampshire Public Radio (May 23, 2005) http://www.nhpr.org/node/8861 ...7-8

Dan Gorenstein, Parental Notification Law Faces Challenge, New Hampshire Public Radio (Nov. 17, 2003) http://www.nhpr.org/node/5396 7

FOSTER'S DAILY DEMOCRAT, (Nov. 18, 2003) 8

Frank Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533 (1983) 21

Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y, 61 (1994) 19

Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71 (1995) 11

Jerry Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI. KENT L. REV. 123, 134 (1989) 21

Judie Brown, *The Exception*, All About Issues, Mar.-Apr. 1992, *available at* http://www.prolife.org.au/articles/abt015.htm 9

Kaiser Daily Reports, In the Courts: Planned Parenthood Affiliate, ACLU, Health Providers to File Suit To Block New Hampshire Parental Notification Abortion Law, (Nov.19, 2003) http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=20932 8

Kenneth J. Arrow, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963) 20

Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 248 (1992) 19, 20

Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417 (2005) 20

Memorandum from Douglas Johnson, National Right to Life Committee Federal Legislative Director and Mary Spaulding Balch, NRLC State Legislative Director to NRLC State Affiliates and Other Interested Parties (Nov. 22, 1996) 9

NARAL Pro-Choice America and NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* (14th ed. 2005) 14, 22, 24, 27

NARAL Pro-Choice America and NARAL Pro-Choice America Foundation, *Who Decides? A State-by-State Review of Abortion and Reproductive Rights in the United States* (13th ed. 2004) 24

NARAL Pro-Choice America and NARAL Pro-Choice America Foundation, *Who Decides? A State-by-State Review of Abortion and Reproductive Rights in the United States* (12th ed. 2003) 24

NARAL and NARAL Foundation, *Who Decides? A State-by-State Review of Abortion and Reproductive Rights in the United States* (11th ed. 2002) 24

NARAL and NARAL Foundation, *Who Decides? A State-by-State Review of Abortion and Reproductive Rights in the United States* (10th ed. 2001) 24

Richard H. Schwartz, SEPTIC ABORTION 7 (1968) 28-29

Samuel E. Kastensmidt, *Federal Judge Strikes N.H. Parental Notification Law*, Center on Reclaiming America, http://www.reclaimamerica.org/pages/NEWS/newspage.asp?story=1500 8

Victor Rosenblum & Thomas J. Marzen, *Strategies for Reversing Roe v. Wade through the Courts*, in ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS, 200 (Dennis J. Horan et al., eds. (1987)) 10

Vital Statistics of the United States, 1965: Vol. II Mortality, Part A (U.S. Gov't Printing Office 1967) 28

MISCELLANEOUS

N.M. Att'y Gen. Op. No. 90-19 (Oct. 3. 1990) *available at* 1990 WL 509590 12

INTERESTS OF AMICUS CURIAE[1]

The NARAL Pro-Choice America Foundation, NARAL Pro-Choice America and the 27 state-based affiliates, chapters and projects of NARAL Pro-Choice America (collectively, "NARAL Pro-Choice America") are organizations that work through the legislative process, in Congress and in the states, to secure policies that reduce unintended pregnancy and the need for abortion, while ensuring access to the full range of reproductive health services and safeguarding the constitutional right to privacy.[2] NARAL Pro-Choice America tracks state and federal legislation, writes reports and amicus briefs, educates the public, serves as a legislative consulting service, and organizes citizens and legislators to protect the freedom to choose. Our work nationally and in the states and our annual publication *Who Decides? The Status of Women's Reproductive Rights in the United States* (formerly, *A State-by-State Review of Abortion and Reproductive Rights)*, inform this brief. As *amicus curiae*, NARAL Pro-Choice America seeks to highlight the Court's and the legislature's respective spheres of authority: declaring this legislation unconstitutional is consistent with the judicial function, whereas reenacting the law with necessary exceptions properly belongs within the purview of the New Hampshire legislature.

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[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity other than the *amici curiae*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

[2] For a complete list of the NARAL Pro-Choice America affiliates, chapters and projects that have signed on to this brief, *see* Additional *Amici*, *infra*.

SUMMARY OF ARGUMENT

The New Hampshire statute at issue in this case, N.H. Rev. Stat. Ann. §§ 132:24-28, contains fatal constitutional flaws, including its obvious lack of a health emergency exception. Courts cannot and should not graft provisions onto this statute to render it constitutional.

The reasons for this are many: first, it would re-negotiate the compromise embodied in the New Hampshire legislation and likely trample upon the wishes of New Hampshire's legislators. In enacting this law, the New Hampshire legislature chose not to include an exception for those emergencies that endanger a minor's health but do not immediately threaten her life. Given the clarity of the law requiring health emergency exceptions and the vigorous advocacy surrounding health exceptions in abortion jurisprudence, the legislature's failure to make provisions to protect young women's health in the event of an emergency can only be called intentional. The "deal" embodied in the legislation should not be rewritten, but rather invalidated.

Second, the Court would be engaging in sheer guesswork if it tried to craft a health emergency exception. Although the Court since *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S 833 (1992), has clearly demanded a medical emergency exception protecting health, it has yet to specify the constitutional minima for such an exception. Thirty-six legislatures around the country have enacted at least twelve formulations protecting women's health in an emergency, with varying specifications as to five separate issues, such as the severity of the health problem, its duration and what types of problems might constitute a health emergency. Thus, if the Court were to write a health emergency exception to save the law from being struck as unconstitutional, its guess would in all likelihood diverge from anything that could have gained consensus among the New Hampshire legislators.

Third, if the Court were to try to cure the law's obvious constitutional defects, it would encourage legislators across the country to act irresponsibly, or even lawlessly. Lawmakers have a duty to uphold the Constitution, including interpretations of the Constitution with which they disagree. The Court should not countenance legislators' intentional disregard for constitutional precepts by drafting obviously necessary provisions for them. Legislators would be free to dodge tough issues and cater to insistent interest groups that favor no health exceptions during the legislative process and thereafter be rewarded by having their laws go into effect as amended by the Court. Instead, the Court should encourage responsible lawmaking by effectively saying "Enact a constitutional bill, and we will uphold it. Flout established law, and we will strike the enactment down."

This has often been the Court's approach, and legislators have by and large responded with a strong measure of fidelity to clear holdings of facial invalidity. Adhering to this approach would encourage conscientious lawmaking, or at least not reward irresponsible lawmaking.

Fourth and relatedly, with respect to protecting women's health, the battle among advocates and key political constituencies is well-articulated, and it carries well-understood political consequences. Although the actual number of women who might be affected by a health emergency exception may not be large, the issue commands the highest level of attention on both sides of the abortion debate. Pro-choice advocates have long defended the pillar of *Roe v. Wade*, 410 U.S. 113 (1973), that protects women's health against relentless criticism and legal attack. By contrast and notwithstanding constitutional law demanding protection for women's health, anti-abortion advocacy groups and legislators typically oppose all abortions other than those necessary to save women's lives, even when the continuation of the pregnancy poses a serious health threat. Given this political landscape, were the Court to craft a

health emergency exception to save the statute, it would become a new political actor in New Hampshire's legislative negotiations.

In sum, declining to rewrite New Hampshire's law to make it constitutional coheres with the Court's expertise, role and function: to say what the law is and to maintain precedent. Rewriting New Hampshire's law would involve the Court in the legislative function, without the democratic procedures of having the legislation considered and voted on by elected officials who hear public testimony and who may be called to account for their actions by the people.

ARGUMENT

I. THE NEW HAMPSHIRE LEGISLATURE CHOSE NOT TO INCLUDE THE CONSTITUTIONALLY REQUIRED HEALTH EXCEPTION, AND THE LAW CANNOT BE SAVED BY CRAFTING A HEALTH EMERGENCY EXCEPTION FOR IT.

It is obvious that New Hampshire's statute does not contain a health emergency exception. Likewise, the remedy is apparent: this Court cannot save the statute for the legislature, when its collective determination – not to have a health exception at all – is manifest.

A. New Hampshire Legislators Were on Notice that the Supreme Court Has Required that Abortion Regulations Must Provide Protection for Women's Health.

For more than 30 years, this Court's abortion jurisprudence has required protections for women's health, and this doctrine has recently been clarified and reaffirmed. Even when the state's interest in fetal life is at its apex late in pregnancy, *Roe v. Wade* forbids a state to interfere with a

woman's choice to have an abortion if continuing the pregnancy would threaten her health. 410 U.S. at 164.

An unbroken line of cases has carried this doctrine to the present. In *Colautti v. Franklin*, the Court disapproved of any "trade off" between the woman's health and an increased likelihood of fetal survival. 439 U.S 379, 400 (1979). In *Thornburgh v. American College of Obstetricians & Gynecologists*, Pennsylvania's second physician requirement failed to provide an exception for situations where waiting for a second physician would endanger a woman's health. Accordingly, the statute was invalidated. 476 U.S. 747, 771 (1986). Though much of *Thornburgh* has been overruled by *Casey*, its holding regarding the necessity for a health emergency exception is undisturbed.

In *Casey*, the Court reiterated *Roe's* prohibition on requirements that burden women's health. Indeed, in assessing the Pennsylvania statute at issue under the Court's new "undue burden" analysis, the Court began by assessing the adequacy of the health emergency definition and referenced *Roe*: that is, the health exception is an independent doctrinal necessity, and its adequacy was the very first point of inquiry for the Court in determining the provisions' constitutionality. The Court noted that the "essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." 505 U.S. at 880. In upholding Pennsylvania's law providing for parental consent, the Court found that the "medical emergency" exception of Section 3202 was sufficiently broad to protect women's health. *Id.* This section of the opinion, Part V-A, was joined by two concurring justices and, thus, was the opinion of the Court. It was a ringing reaffirmation that regulations must explicitly protect women facing health emergencies.

The continued vitality of the health exception was underscored in another context eight years later in *Stenberg v. Carhart*, where the Court struck down Nebraska's ban on abortion procedures for at least "two independent reasons," one being that it failed to include the required health exception. 530 U.S. 914, 930 (2000).

Given these well-publicized and unambiguous rulings, the New Hampshire legislators were on notice about the constitutional necessity to include a health emergency exception. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979). Other states certainly understand these requirements: as we discuss in Part II below, 42 states have enacted a parental involvement law; of these, 36 states explicitly protect minors facing a medical emergency. Ten of the 42 state laws are enjoined or otherwise not in force; some of the litigation in these states and others concerned the laws' failure to protect minors' health in an emergency.[3] New Hampshire legislators' failure to follow unbroken Supreme Court law, their sister states' lead, and the lower court cases striking down statutes for failure to protect women's health, demonstrates defiance towards the law's requirements, defiance that should not be rewarded by fixing the statute for them.

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[3] *See Planned Parenthood of the Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002) (striking down parental involvement law for lack of a health emergency exception); *Planned Parenthood of S. Arizona v. Neely*, 804 F. Supp. 1210 (D. Ariz. 1992) (same); *see also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004) (striking down parental involvement law for lack of an adequate health emergency exception).

B. New Hampshire Legislators Did Not Want a Health Emergency Exception.

The most salient fact in construing the statute is what the statute itself says. This statute says *nothing* about minors' health; the only exemption concerns threats to minors' lives. The New Hampshire statute simply leaves the Court nothing to construe.[4] The New Hampshire statute is crystal clear: doctors may waive the parental notice requirement to protect a minor who may die, but not one who may suffer serious threats to her health.[5]

The failure to include a health exception was not a mere drafting error or legislative oversight that might arguably warrant a judicial remedy to implement the legislature's overall intent. On the contrary, key sponsors of the legislation trumpeted their pride in not including a health exception. Former State Representative Phyllis Woods, a co-sponsor of the bill, declared that the lawmakers intentionally left out a health exception, which she denounced as necessarily too broadly defined.[6] Her comments were echoed by her colleague Fran Wendleboe, who told the Associated Press, "We didn't mistakenly forget to put in a health exception. We purposely crafted the bill without an

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[4] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (citing *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 240 (1989)) (statute is clear; no interpretation necessary).

[5] The New Hampshire legislature's failure to enact an exception protecting minors' health is significant. *See Tanner v. United States*, 483 U.S. 107, 122-25 (1987); *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 441-43 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 663 n.3 (1985).

[6] Dan Gorenstein, Parental Notification Law Faces Challenge, New Hampshire Public Radio (Nov. 17, 2003) http://www.nhpr.org/node/5396.

exception."[7] Woods wanted the Supreme Court to take the case so that the law requiring health exceptions could be challenged:

> It's what we were hoping for [that the Court would grant certiorari]. It's one of the reasons we wrote the law the way we did. Because we thought it would go through all the courts and it would be challenged.[8]

She said that it does not include a health exception because, "[i]f we had written that into the bill[,] it would have made it useless,"[9] ignoring the fact that 36 states have enacted explicit, limited health exceptions in their parental involvement laws. Likewise, Roger Stenson, director of New Hampshire Citizens for Life, who testified in favor of the bill, derided all health exceptions when the law was enjoined for want of a health exception.[10]

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[7] *Abortion Law Was Dangerous*, PORTSMOUTH HERALD, Dec. 31, 2003, *available at* http://www.seacoastonline.com/2003news/12312003/opinion/68065.htm.

[8] Dan Gorenstein, Court Takes Up State's Parental Notification Law, New Hampshire Public Radio (May 23, 2005) http://www.nhpr.org/node/8861.

[9] Kaiser Daily Reports, In the Courts: Planned Parenthood Affiliate, ACLU, Health Providers to File Suit To Block New Hampshire Parental Notification Abortion Law, (Nov. 19, 2003) http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=20932 (quoting FOSTER'S DAILY DEMOCRAT, (Nov. 18, 2003)).

[10] Samuel E. Kastensmidt, *Federal Judge Strikes N.H. Parental Notification Law*, Center on Reclaiming America, http://www.reclaimamerica.org/pages/NEWS/newspage.asp?story=1500.

C. The New Hampshire Law Is Consistent with a Strategy to Eliminate Constitutional Protection for Women's Health.

These statements by the protagonists of this law are consistent with efforts by national anti-abortion organizations that deplore the health exception and their nationwide legislative, litigation and public relations strategy to tear down that tenet of constitutional law respecting women's health. Judie Brown, the head of the American Life League, and Douglas Johnson, the Federal Legislative Director of the National Right to Life Committee ("NRLC"), have each attacked the health exception, Johnson urging NRLC affiliates to resist amendments providing for very limited health exceptions in the context of legislation to ban abortion procedures.[11] NRLC, with chapters in all 50 states and the District of Columbia, is the principal legislative arm of the pro-life movement, so it was particularly significant that it denounced as inadequate any exceptions that would protect women from "serious and permanent impairment of a major bodily function."[12] Many of the *amici curiae* supporting petitioners are clearly hopeful that this case will overturn the constitutional requirement to protect women's health in abortion regulations. A book entitled *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* features strategy papers, one of which declares: "Reversal strategy, which begins by weakening 'viability' and 'health' abortion arguments, is calculated to attack the framework of

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[11] *See* Judie Brown, *The Exception*, All About Issues, Mar.-Apr. 1992, *available at* http://www.prolife.org.au/articles/abt015.htm (opposing all exceptions to abortion bans); Memorandum from Douglas Johnson, National Right to Life Committee Federal Legislative Director and Mary Spaulding Balch, NRLC State Legislative Director to NRLC State Affiliates and Other Interested Parties (Nov. 22, 1996).

[12] Johnson, *supra* note 11, at 2.

the abortion privacy doctrine at its most vulnerable."[13] Against this strategic backdrop, it would be contrary to the intent of the New Hampshire legislature to fix its statute by imputing any intent to protect minors facing health crises.

The filings of the *amici curiae* legislators in this case confirm that their 2003 legislative gamble was intentional. The *amicus* brief of the New Hampshire legislators attacks the health exception as formulated in *Roe* and *Doe v. Bolton*, 410 U.S. 179, 192 (1973), generally, claiming erroneously that including a health exception would render "the statutory duty of parental notification nugatory."[14] The legislators further argue that even under the narrower medical emergency exception standard of *Casey*, on balance, the alleged health benefits of involving parents outweigh the health risks to minors facing emergencies of delaying the procedure[15] – a risk/benefit analysis not found in the Court's jurisprudence and unavailable under New Hampshire's statutory scheme involving a waiting period in any event. Another brief filed on behalf of various legislators defends the narrowness of the life exception as enacted.[16]

Likewise, the Attorney General herself does not urge the Court to save the statute by appending to it the necessary

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13 Victor Rosenblum & Thomas J. Marzen, *Strategies for Reversing Roe v. Wade through the Courts*, in ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS, 200 (Dennis J. Horan et al., eds., (1987)).

14 Brief of New Hampshire Legislators as Amicus Curiae in Support of Petitioner at 26, *Ayotte v. Planned Parenthood of Northern New England* (Aug. 8, 2005).

15 *Id.* at 26-28.

16 Brief of Amici Curiae New Hampshire Representative and HB 763 Sponsor Kathleen Souza et al. at 13, *Ayotte v. Planned Parenthood of N. New England* (Aug. 8, 2005).

health exception. She has abandoned the argument advanced in the District Court and Court of Appeals that other New Hampshire laws can be cobbled together to protect women's health in an emergency. *Planned Parenthood of N. New England v. Heed*, 296 F. Supp. 2d 59, 65-6 (D.N.H. 2003), *aff'd*, 390 F.3d 53, 61 (1st Cir. 2004).

D. The Prudent Remedy Is To Declare the Law Unconstitutional and Let New Hampshire Decide Whether To Try To Reenact the Law with a Health Emergency Exception.

The modest, most prudent course is to strike New Hampshire's parental notice law and allow New Hampshire to enact the medical emergency/waiting period/notification process it favors, if it can muster the votes for any particular formulation. Such was the course followed in Colorado.[17] In *Planned Parenthood of the Rocky Mountain Services Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002), the Tenth Circuit struck down Colorado's parental involvement law that had been enacted through a ballot initiative. In response, the legislature enacted supplemental language that provides a medical emergency exception, expands the list of adults to whom the notification may be given, and establishes a judicial bypass procedure. The law is now in effect.[18]

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[17] *See* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 95 (1995) ("Judicial invalidation gives Congress the opportunity to decide what it wants to do next, in light of the enforced constitutional constraint. And of course one of those options is to reenact the statute in constitutionally acceptable form.").

[18] Colo. Rev. Stat. Ann. §§ 12-37.5-101, 102 (enacted by initiative 1998), §§ 12-37.5-103 to -107 (enacted by initiative 1998; amended 2003); H.B. 03-1376, 64th Gen. Assembly, Gen. Sess. (Colo. 2003) (enacted 2003).

The Colorado example does not prove that the "second choice" of all legislative bodies is a law with a health emergency exception; it says nothing about New Hampshire's second choice – whether to reenact its bill with a health emergency exception or have no bill at all. It simply speaks to which branch of government should make that decision: clearly, the legislature.

The Court cannot presume that New Hampshire would rather have some of its law go into force after the Court carves out a health emergency exemption on behalf of the legislature. States sometimes decline to fix their parental involvement laws that have been struck down. Their second choice is no law at all, not a law with constitutionally required protections. For instance, Nevada's law was struck down in 1991 because the bypass was insufficient.[19] New Mexico's Attorney General opined in 1990 that its parental involvement law was unenforceable because it lacked a bypass procedure.[20] In both states, the legislatures have not enacted a conforming law in the many years since.

As the Court said in *Seminole Tribe of Florida v. Florida*, "[n]or are we free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that § 2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts." 517 U.S. 44, 76 (1996). When confronted with legislative inaction, the courts should decline to insert provisions the legislature should have enacted. As Justice Kennedy wrote in *Salinas v. United*

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[19] *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) (preliminary injunction upheld); *Glick v. McKay*, No. CV-N-85-331-ECR (D. Nev. Oct. 10, 1991) (permanent injunction issued).

[20] N.M. Att'y Gen. Op. No. 90-19 (Oct. 3, 1990) *available at* 1990 WL 509590.

States, 522 U.S. 52, 59-60 (1997) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)):

> Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Matthews*, 465 U.S. 728, 741-42 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Article I, § 1 of the Constitution. *United States v. Locke*, 471 U.S. 84, 95-96 (1985).

This is emphatically the view of the New Hampshire Supreme Court. *In re Jerome*, 843 A.2d 325, 328 (N.H. 2004) (courts cannot limit definition of "gross income" by adding language to statute) (citing *Progressive N. Ins. Co. v. Enterprise Rent-A-Car*, 821 A.2d 991 (N.H. 2003)); *State v. Kidder*, 843 A.2d 312, 316 (N.H. 2004) (refusing to impute exemptions for innocent contact to New Hampshire domestic violence statute); *In re CNA Ins. Cos.*, 722 A.2d 496, 497 (N.H. 1998) ("[W]e 'cannot read words into it which the legislature did not see fit to insert.' *Gregory v. State*, 369 A.2d 181, 181-82 (N.H. 1977).").

II. THE COURT WOULD BE ENGAGING IN SHEER GUESSWORK IF IT WERE TO TRY TO SAVE THE LAW BY DRAFTING A HEALTH EMERGENCY EXCEPTION.

The Court would diminish its own credibility if it appended a medical emergency exception to New Hampshire's law, as such drafting is a quintessentially legislative function. It is impossible for the Court to discern any legislative intent to include a medical emergency exception at all, much less correctly ascertain the scope and

terms of any medical exception that the legislators would have wanted.

A. States Have Enacted at Least Twelve Different Health Emergency Exceptions.

Crafting a medical emergency exception is clearly within the competence of the New Hampshire state legislature, as state legislatures have almost uniformly understood the necessity to protect minors' health in emergency situations. Forty-two states have enacted a parental involvement law.[21] Thirty-six states have explicitly provided some protection for a minor's health in enacting parental involvement/bypass laws.[22] Only four states have

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[21] Ten of the 42 state laws have been enjoined or are otherwise not enforceable: AK, CA, FL, ID, IL, MT, NV, NH, NJ, and NM. NARAL Pro-Choice America and NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* 17 (14th ed. 2005) ("*Who Decides?*"). The laws in force are: Ala. Code § 26-21-3; Ariz. Rev. Stat. § 36-2152; Ark. Code Ann. §§ 20-16-801 *et seq.*; Colo. Rev. Stat. § 12-37.5-104; Fla. Stat. Ann. § 390.01114; Ga. Code Ann. § 15-11-112; Ind. Code Ann. § 16-34-2-4; Iowa Code Ann. § 135L.3; Kan. Stat. Ann. § 65-6705; Ky. Rev. Stat. Ann. § 311.732; La. Rev. Stat. Ann. § 40:1299.35.5; Mass. Gen. Laws Ann. ch. 112, § 12S; Mich. Comp. Laws Ann. § 722.903; Minn. Stat. Ann. § 144.343; Miss. Code Ann. § 41-41-53; Mo. Ann. Stat. § 188.028; Neb. Rev. Stat. § 71-6902; N.C. Gen. Stat. Ann. § 90-21.7; N.D. Cent. Code § 14-02.1-03; Ohio Rev. Code Ann. § 2919.121; Okla. Stat. Ann. tit. 63, § 1-740.2; 18 Pa. Cons. Stat. Ann. § 3206; R.I. Gen. Laws § 23-4.7-6; S.C. Code Ann. § 44-41-31; S.D. Codified Laws § 34-23A-7; Tenn. Code Ann. § 37-10-303; Tex. Occ. Code Ann. § 164.052; Utah Code Ann. § 76-7-304; Va. Code Ann. § 16.1-241; W. Va. Code Ann. § 16-2F-3; Wis. Stat. Ann. § 48.375; and Wyo. Stat. Ann. § 35-6-118.

[22] *See infra* notes 24-35. Three other states give the physician sufficient discretion to provide the abortion to protect a minor's health generally or in an emergency. Del. Code Ann. tit. 24

Footnote continued on next page

parental involvement laws in effect that make no provision for minors' health in an emergency.[23]

No state statute's language is identical to any other state, but there are at least twelve formulations of emergency health exceptions. The twelve types are:

1. "serious risk of substantial and irreversible impairment of major bodily function";[24]

2. "risk of serious impairment of major bodily function";[25]

3. "grave peril of immediate and irreversible loss of major bodily function";[26]

Footnote continued from previous page
§ 1783; Md. Code Ann. § 20-103; Me. Rev. Stat. Ann. tit. 22 § 1597-A.

[23] The four states are MN, MO, ND, WY.

[24] Ariz. Rev. Stat. § 36-2152(G)(2); Ark. Code Ann. §§ 20-16-802, 805 (amended Mar. 4, 2005); Colo. Rev. Stat. §§ 12-37.5-103(5), 105; Del. Code Ann. tit. 24 §§ 1782(d), 1787; Fla. Stat. Ann. § 390.01114; Idaho Code § 18-604 (enjoined); 750 Ill. Comp. Stat. § 70/10 (enjoined); Ky. Rev. Stat. §§ 311.720(12), 732(8); Mich. Comp. Laws §§ 722.902(b), 905; Mont. Code Ann. §§ 50-20-203(5), 50-20-208; N.J. Stat. Ann. §§ 9:17A-1.3, 1.6; Okla. Stat. tit. 63, § 1-740.2; 18 Pa. Cons. Stat. Ann. §§ 3203, 3206; S.D. S.B. 193, 80th Leg. Sess., Reg. Sess. (S.D. 2005) (Enacted 2005); Tex. Fam. Code Ann. §§ 33.001, 004; Tex. Occ. Code Ann. §§ 164/052 (a)(19); S.B. 419 79th Leg. (Tex. 2005) (Enacted 2005); Utah Code Ann. §§ 76-7-301, 305; Va. Code Ann. § 18.2-76.

[25] Iowa Code Ann. §§ 135L.1, *et seq.*

[26] N.D. Cent. Code §§ 14-02.1-03(1), (12).

4. "immediate threat and grave risk to . . . health";[27]

5. "immediate threat and grave risk to . . . permanent physical health";[28]

6. "grave impairment of the physical or mental health of the woman";[29]

7. "grave physical injury";[30]

8. "immediately necessary to preserve the patient's life or health";[31]

9. "medical emergency [that so] complicates the pregnancy [as] to require an immediate abortion";[32]

10. "emergency exists that so compromises the health, safety or well-being of the mother as to require an immediate abortion";[33]

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[27] Ind. Code § 16-34-2-4(i); Neb. Rev. Stat. § 71-6906; W. Va. Code Ann. § 16-2F-5.

[28] La. Rev. Stat. § 40:1299.35.12.

[29] N.M. Stat. Ann. § 30-5-1(C) (enjoined).

[30] S.C. Code Ann. § 44-41-30(C).

[31] Nev. Rev. Stat. § 442.255.

[32] Miss. Code § 41-41-57; N.C. Gen. Stat. § 90-21.9; Tenn. Code Ann. § 37-10-305; Wis. Stat. § 48.375(4)(b). Georgia substitutes "condition of the minor" for "pregnancy." Ga. Code Ann. § 15-11-116;

[33] Ala. Code § 26-21-5; Kan. Stat. Ann. § 65-6705(j)(1)(B) (minor difference in language from Alabama's).

11. "medical emergency requiring immediate medical action";[34]

12. "emergency requiring immediate action."[35]

These twelve types of laws spotlight the sheer guesswork that would be involved in trying to create an exception on New Hampshire's behalf.

B. The Court Would Have To Make at Least Five Legislative Choices To Save the Statute.

If the Court were to write a medical emergency exception to avoid its facial invalidation, it would have to make decisions along at least five axes: severity, time, what is at risk, the likely duration of the health problem, and who decides whether the minor faced a health threat. Legislatures have made divergent choices as to:

1. **The severity of the risk:** compare "serious threat" (18 states), with "emergency exists" (AL, AR, CA, GA, KS, MS, NC, ND, RI, SC), "risk" (IA), "likely" (NM), and "grave risks" (IN, LA, NE, WV).

2. **The immediacy of the threat:** compare necessitates/requires immediate (medical) action/abortion (AL, CA, GA, IA, KY, LA, MI, MS, NJ, NC, OH, PA, RI, TN, UT, VA, WI), with delay will create serious risk (AZ, AR, CO, DE, FL, ID, IL, IA, KY, MI, MT, NJ, OK, PA, UT, VT), insufficient time to obtain consent (AR, CO, FL, NE, SD, TX), emergency need for a medical procedure to be performed (IN, WV), continuation of pregnancy provides immediate threat (NE), no immediacy/emergency

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[34] Cal. Health & Safety Code § 123450(a) (enjoined).

[35] Mass. Gen. Laws ch. 112 § 125; R.I. Gen. Laws § 23-4.7-4.

requirement (NM), "emergency exists" (SC), and "to avoid serious risk" (TX). (Note that many states demand compliance with more than one criterion.)

3. **What is threatened:** compare "grave physical injury" (SC) with "physical health" (OH), "grave impairment of physical or mental health" (NM), "impairment of major bodily function" (AZ, AR, CO, DE, FL, ID, IL, KY, MI, MT, NJ, OK, PA, SD, TX, UT, VA), "threaten the health, safety or well-being of the mother" (AL, KS), "the pregnancy" (MS, NC, TN, WI), "the condition of the minor" (GA), unspecified medical emergency (CA, MA, RI), "loss of major bodily function" (ND), "potential suicide" (WI), and preservation of health (NV).

4. **The duration of the health risk:** "irreversible" (18 states) or silent as to duration (19 states).

5. **Physician's judgment:** Compare "best" judgment (KS, MS, MT, NE, NC, TN, WI) with "good faith" (AZ, CO, DE, FL, IL, MI, MT, NJ, ND, PA, SD, TX, UT), "judgment of the physician" (NV), and "physician determines" (SC). Some states require a certification, (possibly triggering other charges for false statements or certifications) either immediately or within 24 hours (GA, IN, IA, LA, OH, RI, SD, TX, VA, WA). One state just requires the physician to record the reasons in writing (MS). Others are silent as to whether a jury could revisit the question of whether the minor's medical emergency fit the exception.

With at least five variables, some of which contain multiple options, it is clear that the Court would be throwing darts if it tried to craft an emergency exception on behalf of the New Hampshire state legislature. The statute is simply not "readily susceptible" to limitations; it cannot be rewritten. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). Carving out a medical health exception would

clearly necessitate "tamper[ing] with the text of the statute," a practice the Court "strive[s] to avoid." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 478 (1995). *See also Tafflin v. Levitt*, 493 U.S. 455, 462 (1990) ("[E]ven if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate.").

C. Public Choice Theory Confirms That New Hampshire's Second-Choice Wishes Cannot Be Ascertained.

One method the Court could *not* credibly employ would be to guess what New Hampshire's legislature would have done if it were referred the question of what type of emergency medical health exception it would want. The legislature's intent, beyond the intent not to have an emergency medical exception at all, is completely inscrutable. The New Hampshire House of Representatives has between 375 and 400 members, and the Senate has 24 members.[36] Each legislator has a distinct constituent base, self-interest in re-election, and particular policy convictions. *See* Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 248 (1992). The entire legislature, and indeed each chamber, does not speak with a collective voice, other than when it enacts legislation, nor does it have a single collective intent. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y, 61, 68 (1994). The absence of a collective intent, other than as actually expressed in its legislation, precludes this Court from guessing whether the New Hampshire legislature would have preferred a parental notification statute with a constitutionally required medical health

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[36] N.H. Const. p.2 Arts. 9, 25.

emergency exception, or no legislation at all, much less which of the various formulations it might have chosen.

Moreover, even in the face of clear evidence (and *no evidence* has been adduced here) that the New Hampshire legislature would have preferred a statute with a health exception to no statute at all, it is not certain such a statute would have been enacted.[37]

Arrow's Theorem shows the difficulty in predicting legislative action.[38] If presented with three choices, A, B, and C, Option A may defeat Option B; Option B may defeat Option C; but Option A will not necessarily defeat Option C. The New Hampshire legislature was presented with at least three options: no bill, a bill with a health emergency exception, or a bill without a health emergency exception. If the Court finds the law constitutionally defective for want of a health emergency exception, it would not necessarily be implementing the collective will of the legislature to graft health emergency provisions onto the law to save it, according to Arrow's Theorem. The calculus is proportionately more indeterminate once we add the twelve existing types of emergency health exception, or the five dimensions of decision-making with respect to health exemptions.

The process of voting on successive amendments, "logrolling" (when a legislator votes against a bill she favors in order to gain support for a bill she favors more or vice

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[37] *See* Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417 (2005).

[38] *See* Shepsle, *Congress is a "They," Not an "It"*, 12 INT'L REV. L. & ECON. at 241-42 (citing Kenneth J. Arrow, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963)) (describing Arrow's Theorem).

versa), and the role of interest groups and self-interest, all create uncertainty in the legislative process. As Judge Easterbrook has written:

> [T]he order of decisions and logrolling are . . . so integral to the legislative process that judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses, and thus to lack the legitimacy that might be accorded to astute guesses.

Frank Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 547-48 (1983). The bill as enacted by the legislature was its compromise, summing all the political forces and interests and ideologies at work at that particular time.[39] Thus, the Court cannot later attempt to recreate the voting patterns of New Hampshire and insert provisions it believes New Hampshire would have adopted, in an attempt to save otherwise unconstitutional legislation. The legislation is a deal, one the Court cannot and should not renegotiate.

III. THE CONSEQUENCES OF REWRITING THE LAW TO SAVE IT WOULD BE UNFORTUNATE FOR COURTS AND LEGISLATURES ALIKE.

Regarding abortion, legislators often press the law as far as it can be pressed. They usually legislate in gray areas, but if the demand to craft legislation within constitutional limits were lifted, we could expect to see far more legislation in areas that the Court has previously foreclosed. Debate on the toughest issues, such as the scope of exceptions, would

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[39] *See* Jerry Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 134 (1989).

often be cut off by committee chairs or majority leaders, who would insist on broad restrictions without any exemptions. Lawmakers would ignore the Constitution and punt the toughest negotiations to the courts for resolution.

A. Knowing that Flagrantly Unconstitutional Laws Will Be Struck Down, Legislators Tend To Legislate in Gray Areas.

In tracking state laws, NARAL Pro-Choice America has found that, state legislators sometimes legislate in an effort to change constitutional law to which they object. Yet for the most part, they abide by clear constitutional rulings. Anti-choice efforts have typically focused on taking full advantage of any room for state regulation allowed by the Court, finding new and untested areas to regulate, and pressing constitutional change where a doctrine is especially important to a woman's right to choose or when they believe a doctrine is vulnerable.

Examples abound. Abortion bans, review of abortion requests by hospital committees, and bans on out-of-state women obtaining abortions nearly halted after *Roe v. Wade* and *Doe v. Bolton*. After *Roe*, the focus of anti-abortion advocacy shifted to efforts to bar public funding and public involvement in any way, to restrict minors' access, and to enact bans on abortion procedures, such as the use of saline instillation.[40] After *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), however, states by

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[40] The Hyde Amendment, Pub. L. 96-86 § 109, 93 Stat. 926 (1979), was upheld in *Harris v. McRae*, 448 U.S. 297 (1980), the example of which has been followed by 33 states. *Who Decides?* at 14. In *Bellotti v. Baird*, 443 U.S. 622 (1979), the Court established constitutional requirements for valid judicial bypass laws, and 42 states have enacted parental involvement laws. *Who Decides?* at 17.

and large stopped trying to ban saline abortions. Following the decision in *Webster v. Reproductive Health Services*, 429 U.S. 490 (1989), which cast doubt on the continued vitality of *Roe*, abortion bans were enacted in Guam,[41] Louisiana,[42] and Utah.[43] But after *Casey* upheld the core right articulated in *Roe*, to have a legal abortion, such wholesale, frontal bans on abortion once again stopped, at least for the most part.[44] The *Danforth* case also struck husband consent laws, but in the wake of *Webster*, Pennsylvania again attempted to enact another husband involvement law.[45] Pennsylvania's husband notice law was held unconstitutional in *Casey*, and no similar legislation has been enacted in the 13 years since then. Bans on broad, vaguely defined abortion procedures lacking health exceptions were held unconstitutional in *Stenberg v. Carhart*. Although 30 states had enacted such bans, since the Court's clear ruling in *Stenberg*, few legislatures have revisited this

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[41] 9 Guam Code Ann. §§ 31.20-23 (enacted 1990, declared unconstitutional in *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1991)).

[42] La. Rev. Stat. Ann. §14:87 (enacted 1942; amended and reenacted 1991, held unconstitutional in *Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992)).

[43] Utah Code Ann. § 76-7-314 (enacted 1991, held unconstitutional in *Jane L. v. Bangerter*, 809 F. Supp. 865 (D. Utah 1992) (portions of this ruling related to abortion regulations after the 20th week of pregnancy were appealed, however provisions related to the entire abortion ban were not)).

[44] *But see* Mich. Comp. Laws Ann. § 33.1081-1085 (redefining abortion so as effectively to ban most abortions), *enjoined*, *Northland Family Planning Clinic v. Cox*, No. 2:05-cv-70779 (E.D. Mich. Sept. 12, 2005).

[45] 18 Pa. Cons. Stat. Ann. § 3209 (amended 1989). Only three other states had legislated in this area in the sixteen years between *Danforth* and *Casey*: Illinois, 735 Ill. Comp. Stat. Ann. 5/11-107.1 (1985); Kentucky, Ky. Rev. Stat. Ann. § 311.735 (1982); and Rhode Island, R.I. Gen. Laws Ann. §§ 23-4.8-1 to 4.8-5.

issue. The exceptions of Utah and Virginia[46] (and the U.S. Congress[47]) prove the rule.

Every year, NARAL Pro-Choice America analyzes the top areas of state legislative activity, based upon regular legislative tracking documents and meticulous counts of bills introduced and enacted. A summary of the analysis contained in *Who Decides?* for each of the past five years shows that legislators tend to enact legislation where they are not squarely prohibited by existing precedent from doing so.[48]

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[46] Utah Code Ann. §§ 76-7-301(3), 310.5, 314, 326-330 (enacted 2004) contains exclusions on the procedures covered, in contrast to the Nebraska ban, but no health exception. *Utah Women's Clinic v. Walker*, No. 2:04CV00408 (D. Utah May 5, 2004) (enjoined by stipulation and order). Virginia ignored *Stenberg*'s holding regarding health exceptions in enacting Va. Code Ann. §18.2-71.1, which was enjoined in *Richmond Medical Center for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005). Ohio enacted a law before the decision in *Stenberg* that differed from the pattern bills most states enacted. Ohio Rev. Code Ann. § 2919.151.

[47] The federal ban, 18 U.S.C. § 1531, has no health exception and was enjoined in *Carhart v.Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004), *aff'd*, *Carhart v. Gonzales*, 413 F.2d 791 (8th Cir. 2005), *petition for cert. filed* (Sept. 23, 2005) (No. 05-380), as well as in two other district court cases, *Planned Parenthood Federation of America v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *appeal pending*, No. 04-16621 (9th Cir. filed Aug. 20, 2004); and *National Abortion Federation v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), *appeal pending*, No. 04-5201 (2d Cir. filed Sept. 29, 2004).

[48] NARAL Pro-Choice America and NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women's Reproductive Rights in the United States* (10th-14th eds. 2000-2005) (before 2005, *Who Decides? A State-by-State Review of Abortion and Reproductive Rights*). Note that the terms used to

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2004: Mandatory counseling and waiting periods; refusal clauses;[49] restrictions on young women's access to reproductive health services; targeted regulation of abortion providers (TRAP) (regulations not applied to medical practices other than ones providing abortion services); and promoting or requiring abstinence-only legislation.

2003: Restrictions on minors' access; mandatory counseling and waiting periods; measures giving legal status to embryos and fetuses; refusal clauses; and TRAP laws.

2002: Mandatory counseling and waiting periods; restrictions on minors' access; recognition of embryos and fetuses; TRAP laws; gag rules, censorship; and refusal clauses.

2001: Promoting crisis pregnancy centers and otherwise repositioning the anti-choice position as "protecting women;" linking abortion to breast-cancer; TRAP laws; elevating the legal status of the fetus; and chipping away at choice through waiting periods, biased counseling, and minors' access laws.

2000: Minors' access and information; funding for crisis pregnancy centers; elevating the status of the fetus; TRAP legislation; funding limits and limits on public facilities; "informed" consent/waiting period legislation; medical abortion legislation; pharmacist conscience clause (refusal clause) legislation; bans on abortion procedures; and prohibitions on insurance coverage for abortion.

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describe similar types of legislation sometimes differed from year-to-year.

[49] Refusal clauses allow individual providers or institutions and insurers to refuse to dispense contraceptives, provide sterilizations or offer abortions.

Of the hundreds of bills considered each year regarding abortion, only a handful of enacted statutes clearly contravene well-established constitutional requirements. When they do, it may be because legislators wish to test the continued validity of the law or be seen as taking a stand against the Supreme Court's holdings, whether or not their laws ever go into effect. In that case, they gamble: they know that if they fail to overturn existing law, their enactments will be null and void.

B. If the Court Were To Rewrite New Hampshire's Law Rather Than To Find It Facially Unconstitutional, Legislatures Would Impose upon the Courts Ever More Demands To Graft Provisions onto Abortion Laws To Render Them Constitutional.

This trend to respect black letter law could be drastically altered if the Court were to embark on judicially writing exceptions into abortion laws to save them from invalidation. Interest group pressures could be such that legislatures would frequently omit all health exceptions, placing that burden upon the courts. Legislatures would avoid the ethical debates over whether parents' interest in knowing about their daughters' health issues trumps the minor's health itself in an emergency. Legislatures would not face competing considerations between enacting valid restrictions up to the law's limits, or enacting grandstanding legislation that defies the law and is certain to be struck down. They would be empowered to enact patently unconstitutional legislation – and many would – with the understanding that courts would amend the laws to make them constitutional. Judicial review would become the final third of the legislative enactment process, with no end in sight to the courts' legislative drafting responsibilities. Legislative process would then be described as:

1. bicameral enactment;
2. presentment;
3. judicial amendment.

State parental involvement laws might be drafted without bypass provisions, leaving the Court to craft them state-by-state. Worst of all, several states' legislatures might enact a ban on all abortions and let the courts figure out the necessary exceptions.[50]

The Court has declined such a role in other areas of the law. In *Reno v. American Civil Liberties Union*, this Court decided not to graft provisions onto a severable part of the Communications Decency Act to save its constitutionality, as it refused to allow Congress to cast an unconstitutionally wide net, only to have the Courts narrow it. 521 U.S. 844, 882-85 (1997). The Court recognized that this would "substitute the judicial for the legislative department of the government." *Id.* at 884 n.49 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)). It also recognized that rewriting statutes would remove legislatures' incentive to narrowly tailor legislation. 521 U.S. at 885, n.50 (citing *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)).

C. If the Court Were To Craft an Emergency Medical Exception or a Broader Health Exception, It Would Short-Circuit the Litigation Process over Its Adequacy.

Crafting an emergency medical exception on behalf of the legislature would not only create legislative results where none existed, it could also foreshorten the advocacy process, through which the adequacy of any health

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[50] NARAL Pro-Choice America estimates that as many as 19 states would ban abortion, given their current political composition, if *Roe* were overturned. *Who Decides?* at 3.

emergency exception should be tested. The Court would also be acting without the benefit of the hearings, testimony, and public involvement that inform the legislative process.

D. Politically Responsive Actors Should Determine the Details of the Health Emergency Exception.

Legislation in this area is hyper-political, conducted against a backdrop of intense lobbying, grassroots mobilization, constitutional litigation, and electoral support or opposition. Because every detail of parental involvement legislation is subject to negotiation, compromise, and electoral repercussions, the Court should not choose which formulation of a heath emergency exception the legislature would have or should have adopted. The Court's role is to enforce constitutional doctrine respecting women's health; and otherwise, to let the political players, well-informed as they are about the Constitution's demands, sort out whatever compromises they can reach.

Many pro-choice advocates and legislators insist upon maintaining broad protection for women's health, especially in emergency circumstances. The Court's insistence that women's health must always be protected has been a milestone of women's advancing equality. Protecting women's health serves as a point of remembrance of the toll abortion prohibitions took on women's health prior to *Roe v. Wade*[51] and as a warning that women's health will suffer if

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[51] In 1965, illegal abortion accounted for an estimated 17 percent of all deaths due to pregnancy and childbirth. *See Vital Statistics of the United States, 1965: Vol. II Mortality*, Part A (U.S. Gov't Printing Office 1967). One report published in 1968 estimated that "as many as 5,000 American women die each year as a direct result of criminal abortion. The figure of 5,000 may be a minimum estimate, inasmuch as many such deaths are mislabeled or unreported." Richard H. Schwarz, SEPTIC

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the right to choose is narrowed further or taken away entirely.

By contrast, hard-line opponents of a woman's right to choose do not recognize that women's health takes priority over the state's interest in fetal life. Their rhetoric characterizes protections for women's health – even protections limited to emergencies that pose a serious, immediate and permanent threat to major bodily functions – as protecting frivolous concerns or adhering to an overall body of law that they consider illegitimate and an anathema.

Political benefits and consequences flow to legislators who adhere to or diverge from the demands of advocacy groups regarding abortion and women's health. Both pro-choice supporters and anti-abortion activists constitute an informed, active citizenry. This citizenry monitors legislation, advises legislators, compiles voting records, vets candidates, summons activists, and turns out the vote for legislators who support their causes. In this area, especially, the Court should not do the work of legislators and re-cut the deal New Hampshire struck in enacting Section 132:24-28. It should strike it down. Let the legislators hear evidence on medical emergencies, consider constituent views, decide whether to enact a constitutional provision, and then face their constituents.

CONCLUSION

Consistent with the Court's role and function, to say what the law is and to enforce precedent, the Court must strike down New Hampshire's law as unconstitutional, allowing New Hampshire's legislators to make the quintessentially legislative decisions as to how they wish to

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Footnote continued from previous page
ABORTION 7 (1968).

protect minors' health in emergency situations, if they still want a parental notice law.

Respectfully submitted,

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No. 04-1144

In the
Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For The First Circuit

BRIEF OF AMICI CURIAE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, ET AL. IN SUPPORT OF RESPONDENTS PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, ET AL.

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Planned Parenthood v. *Heed*,
296 F. Supp. 2d 59 (D.N.H. 2003).....15

Planned Parenthood v. *Heed*,
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Planned Parenthood v. *Miller*,
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Roe v. *Wade*, 410 U.S. 113 (1973) 3

Stenberg v. *Carhart*, 530 U.S. 914 (2000).....3

Thornburgh v. *Am. Coll. of Obstetrics &
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Zbaraz v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985),
aff'd by an equally divided Court,
484 U.S. 171 (1987).....15

STATE CASES

Am. Academy of Pediatrics v. *Lungren*, 940 P.2d 797 (Cal. 1997) 13

N. Florida Women's Health & Counseling Servs., Inc. v. *Florida*, 866 So. 2d 612 (Fla. 2003) 13

STATUTES

N.H. Rev. Stat. Ann. § 132:25 ..... 3, 4

N.H. Rev. Stat. Ann. § 132:26 ..... 3, 10, 16

OTHER AUTHORITIES

The Alan Guttmacher Inst., *U.S. Teenage Pregnancy Statistics: Overall Trends, Trends by Race & Ethnicity & State by State Information* (2004) 5

Am. Med. Ass'n, Council on Scientific Aff., *Adolescents as Victims of Family Violence* 270 JAMA 1850 (1993) 5, 6

Am. Med. Ass'n, *Featured Report: AMA Data on Violence Between Intimates* (2000) 5, 7

Am. Med. Ass'n, Council on Ethical & Jud. Aff., *Mandatory Parental Consent to Abortion*, 269 JAMA 82 (1993) 5, 13

Am. Med. Ass'n, *Physicians & Family Violence: Ethical Considerations*, 267 JAMA 3190 (1992) 7

Evvie Becker-Lausen & Annette U. Rickel, *Integration of Teen Pregnancy and Child Abuse Research: Identifying Mediator Variables for Pregnancy Outcome*, 16 J. of Primary Prevention 39 (1995) 8

Robert Blum et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. of Pub. Health 619 (1987) 11

Debra Boyer & David Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy an Child Maltreatment*, 24 Family Planning Perspectives (1992) 8

Michael B. Bressman & Fernando R. Laguarda, *Jaffee* v. *Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 Creighton L. Rev. 319 (1997) 16

Rebecca L. Burch & Gordon G. Gallup Jr., *Pregnancy as a Stimulus for Domestic Violence*, 19 J. of Fam. Violence 243, 245 (2004) 12

Janice R. Butler & Linda M. Burton, *Rethinking Teenage Childbearing: Is Sexual Abuse a Missing Link*, 39 Family Relations 73 (1990) 8

Lauren Bennett Cattaneo & Lisa A. Goodman, *Victim-Reported Risk Factors for Continued Abusive Behavior: Assessing the Dangerousness of Arrested Batterers*, 31 J. of Community Psychol. 349 (2003) 12

Deborah L. Covington et al., *Severity, Manifestations and Consequences of Violence Among Pregnant Adolescents*, 28 J. of Adolescent Health 55, 57 (2001) 12

Jill Davies, Greater Hartford Legal Assistance, *Safety Planning* (1997) 12

Marija G. Dunn et al., *Origins and Consequences of Child Neglect in Substance Abuse Families*, 22 Clinical Psychology Rev. 1063 (2002) 7, 8, 14

Kathleen Coulborn Faller, U.S. Dep't of Health & Human Servs., *Child Sexual Abuse: Intervention and Treatment Issues* 12 (1993) 7

David M. Fergusson, *Childhood Sexual Abuse and Psychiatric Disorder in Young Adulthood: Prevalence of Sexual Abuse and Factors Associated with Sexual Abuse*, 34 J. of Am. Acad. Child Adolescent Psychiatry 1355 (1996) 6

David Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, & Risk Factors*, 14 Child Abuse & Neglect 19 (1990) 6

Kevin Fiscella, et al., *Does Child Abuse Predict Adolescent Pregnancy?*, 101 Pediatrics 620 (1998) 8

Richard J. Gelles, *Violence and Pregnancy, Are Pregnant Women at Greater Risk of Abuse?*, 50 J. of Marriage & the Fam., 841 (1988) 12

Arthur H. Green, *Child Sexual Abuse: Immediate & Long-Term Effects & Intervention*, 32 J. Am. Acad. Child Adolescent Psychiatry 890 (1993) 6, 7

Barbara J. Hart, Pa. Coalition Against Domestic Violence, *Safety and Accountability: The Underpinnings of a Just Justice System* (May 1998) 12

Stanley K. Henshaw, *Abortion Trends in 1987 & 1988: Age & Race*, 24 Family Planning Perspectives 85 (1992) 5

Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 Family Planning Perspectives 194 (1992) 11

Ellen C. Herrenkohl et al., *The Relationship Between Early Maltreatment and Teenage Parenthood*, 21 J. of Adolescence 291 (1998) 8

Susan D. Hillis et al., *The Association Between Adverse Childhood Experiences and Adolescent Pregnancy,Long-Term Psychosocial Consequences, & Fetal Death*, 113 Pediatrics 320 (2004) 5

Sandra Kaplan, *Adolescent Abuse*, 4 Adolescent Psychol. & Soc. Issues 65 (1994) 6

Nancy D. Kellogg et al., *Early Sexual Experiences Among Pregnant and Parenting Adolescents*, 34 Adolescence 293 (1999) 6

Douglas Kirby, Nat'l Campaign to Prevent Teen Pregnancy, *Emerging Answers: Research Findings on Program to Reduce Teen Pregnancy (Summary)* (2001) 4

Jonathan D. Klein, Am. Acad. of Pediatrics, *Adolescent Pregnancy: Current Trends & Issues*, 116 Pediatrics 281 (2005) 8

Nat'l Research Council, *Understanding Child Abuse & Neglect* (1993) 7

Stephanie Paul, ABA Commission on Domestic Violence, *Legal Services, in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* 15, 15, 17 (Margaret B. Drew et al. eds., 2nd ed. 2004) 17

Elizabeth M. Saewyc et al., *Teenage Pregnancy & Associated Risk Behaviors Among Sexually Abused Adolescents*, 36 Perspectives on Sexual & Reproductive Health 98, 100 (2004) 8

Cathy Schoen et al., *The Commonwealth Fund Survey of the Health of Adolescent Girls* 1 (1997) 6, 7, 9

Andrea J. Sedlak & Diane D. Broadhurst, U.S. Dep't of Health & Human Servs., *The Third National Incidence Study of Child Abuse and Neglect* (1996) ("*NIS-3*") 6, 7, 14

U.S. Dep't of Health & Human Servs., *Child Maltreatment 2003* (2005) 7, 14, 15

Laurie Zabin et al., *To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents' Communication With Parents and Parent Surrogates*, 24 Family Planning Perspectives 148 (1992) 11

Joan Zorza, ABA Comm'n on Domestic Violence, *Confidentiality, in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* 64 (Margaret B. Drew et al. eds., 2nd ed. 2004) 16

Joan Zorza, *Recognizing & Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 Fam. L.Q. 273 (1995-1996) 16

INTEREST OF *AMICI CURIAE*[1]

The following organizations respectfully submit this brief as *Amici Curiae* in support of Respondents. *Amici* represent teen victims of abuse who are directly and adversely affected by the lack of a health exception in the New Hampshire Parental Notification Prior to Abortion Act (the "New Hampshire Act" or the "Act"), and they urge this Court to affirm the decision of the United States Court of Appeals for the First Circuit holding that the New Hampshire Act is unconstitutional.[2]

The **National Coalition Against Domestic Violence** ("NCADV") was formally organized in January 1978, and is dedicated to providing advocacy, leadership, representation, and support to battered women and their children across the United States. NCADV's work includes coalition building at the local, state, regional, and national levels; support for the provision of community-based services such as safe houses and shelter programs; public education and technical assistance; policy development and innovative legislation; and efforts to eradicate the social conditions that contribute to domestic violence. NCADV's membership is comprised of over one thousand grassroots organizations, community programs, and individuals dealing with the concerns of battered women and their families. NCADV believes that abused teens are owed safe access to reproductive services, and that the absence of a health exception

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[1] All parties in this matter have consented to the filing of this *amici curiae* brief, as evidenced by letters of consent filed with the Clerk. *Amici* are not related in any way to any party in this case, and no party or its counsel has authored any part of this brief. No person or entity other than *amici* and their counsel has made any monetary contribution to the preparation of this brief.

[2] Counsel gratefully acknowledge the research assistance of Sara I. McClelland, Doctoral Program in Psychology, The Graduate Center, City University of New York and Michelle Zeitler, MPH, Research Coordinator, Department of Obstetrics and Gynecology, Columbia University Medical Center.

in parental notification laws violates teen's constitutional rights and places them at risk for further abuse.

Break the Cycle is the nation's first organization to provide law-based domestic violence services *exclusively* to young people, ages 12 to 22. The mission of Break the Cycle is to engage, educate and empower youth to build lives and communities free from domestic violence. Break the Cycle provides youth with preventive education, free legal services and information and peer leadership opportunities. In addition, Break the Cycle also advocates change in state and federal policies to assure greater legal rights for young victims of abuse. The group joins in this amicus brief to highlight the significant harm posed to abused teens when parental notification laws do not provide an health exception for medical emergencies.

Pegasus Legal Services, a nonprofit organization founded in 2002 and incorporated in New Mexico, is dedicated to improving the well-being of children and provides legal services to children and their caregivers. Among other things, Pegasus Legal Services provides legal services for youth regarding medical and mental health services, emancipation, teen pregnancy and protective orders. The group joins in this brief as an advocate for the health and safety of abused and neglected teens, and supports Respondents' position that a parental notification law without a health exception is unconstitutional.

Women Empowered Against Violence, Inc. (WEAVE), a nonprofit organization founded in 1997 and incorporated in the District of Columbia, provides holistic services to adult and teen survivors of domestic and dating violence. WEAVE's Teen Dating Violence Program provides legal, counseling, economic, and educational services to help enable teen survivors to free themselves safely from the cycle of abuse, attain independence and self-sufficiency, and live empowered lives. WEAVE has learned from working with teens that abused adolescents face many barriers to accessing reproductive health care. Because parental notification laws that lack health exceptions and

confidentiality protections will place abused teens at risk of severe harm at the hands of their abusers, WEAVE believes that the New Hampshire Act prevents abused teens from safely exercising their constitutionally guaranteed right to make choices regarding the termination of pregnancy.

SUMMARY OF ARGUMENT

This Court has identified a specific and independent constitutional requirement that state restrictions on access to abortion must contain an exception to preserve women's health. *Stenberg* v. *Carhart*, 530 U.S. 914, 929-30, 938 (2000); *Planned Parenthood* v. *Casey*, 505 U.S. 833, 879-80 (1992); *Roe* v. *Wade*, 410 U.S. 113, 164-65 (1973). The statute being challenged in this case, the New Hampshire Parental Notification Prior to Abortion Act (the "New Hampshire Act" or the "Act"), lacks such a health exception, and it therefore is plainly—and facially—unconstitutional, as the First Circuit correctly held. In this brief, *amici* discuss the significant negative impact that the Act's lack of an emergency medical exception would have on teenagers who are the victims of abuse or neglect.

Section 132:25 of the Act provides that physicians may not perform an abortion on a teenager until 48 hours after written notice of the abortion has been delivered to the teenager's parent or guardian. N.H. Rev. Stat. Ann. § 132:25. The only exceptions to this notification requirement are: (1) when the physician certifies that the abortion is necessary to prevent the minor's death and there is insufficient time to provide notice; or (2) when the person entitled to notice certifies in writing that he or she has been notified. *Id.* § 132:26(I). The Act also contains a judicial bypass procedure. *Id.* § 132:26(II). The bypass procedure provides that a teen may obtain an abortion without parental notification if she can demonstrate that she is mature and capable of providing informed consent on her own, or, if she is not sufficiently mature, that her best interest would be served by allowing her to obtain an abortion without parental

involvement. *Id.* Of particular significance here, the Act does not contain an exception for situations in which an abortion is needed immediately to protect the teen's health.

Abused and neglected teens are uniquely affected by this notification scheme and the absence of an emergency medical exception. Were the New Hampshire Act to be upheld (and it should not be), in a medical emergency, abused teens would be forced either: (1) to inform their parents about the abortion but risk the serious abuse that notification might entail; or (2) to use the judicial bypass mechanism but face the health risks resulting from the delay that the bypass procedure would impose. Similarly, many neglected teens would have to wait for a judge to authorize their abortion because they cannot rely on a parent to provide a certification in time to protect their health. The State of New Hampshire has no legitimate interest in forcing teens into this dangerous position, and it cannot, consistent with this Court's precedents, restrict these teenagers' access to medically appropriate care without providing an emergency medical exception.

ARGUMENT

I. ABUSED AND NEGLECTED TEENS ARE AT AN INCREASED RISK OF FACING MEDICAL EMERGENCIES THAT WILL REQUIRE IMMEDIATE ABORTIONS

Each year, approximately 900,000 teenagers become pregnant in the United States, and although rates are decreasing, more than 4 in 10 adolescent girls will have been pregnant at least once before they reach the age of 20.[3] Notably, a significant portion of teenage pregnancies occur in minors—and

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[3] Douglas Kirby, Nat'l Campaign to Prevent Teen Pregnancy, *Emerging Answers: Research Findings on Program to Reduce Teen Pregnancy (Summary)* 3 (2001).

many of these pregnant teens experience abuse or neglect at home.[4] For these teenagers—teenagers who are the victims of abuse or neglect—the home is not a place of caring, love and support as it is for other teens. Instead, it is a place of fear, violence and intimidation.[5] As we explain further below, for abused and neglected teens, the New Hampshire Act's lack of a health exception is extremely dangerous and, thus, unconstitutional.

A. Intrafamily Abuse And Neglect Are Major Problems in the United States

Approximately 1.6 million minors are abused or neglected in the United States every year—with many of the victims being teenage girls.[6] Teenage girls in particular experience abuse and

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4 *See, e.g.*, The Alan Guttmacher Inst., *U.S. Teenage Pregnancy Statistics: Overall Trends, Trends by Race & Ethnicity & State by State Information* 3 (2004); Susan D. Hillis et al., *The Association Between Adverse Childhood Experiences & Adolescent Pregnancy, Long-Term Psychosocial Consequences, & Fetal Death*, 113 Pediatrics 320, 322 (2004); Stanley K. Henshaw, *Abortion Trends in 1987 & 1988: Age & Race*, 24 Family Planning Perspectives 85 (1992).

5 Am. Med. Ass'n, Council on Ethical & Jud. Aff., *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 83 (1993) ("AMA, *Mandatory Parental Consent to Abortion*").

6 Andrea J. Sedlak & Diane D. Broadhurst, U.S. Dep't of Health & Human Servs., *The Third National Incidence Study of Child Abuse & Neglect* 3-3 & Table 3-1 (1996) ("*NIS-3*"); Am. Med. Ass'n, Council on Scientific Aff., *Adolescents as Victims of Family Violence*, 270 JAMA 1850, 1851 (1993) (noting that 42 percent of reports of sexual abuse from one state involved adolescents) ("AMA, *Adolescents as Victims of Family Violence*"); Am. Med. Ass'n, *Featured Report: AMA Data on Violence Between Intimates* (2000), http://www.ama-assn.org/ama/pub/category/13577.html ("AMA, *AMA Data on Violence Between Intimates*"). What is perhaps most significant about these statistics is that abuse is significantly underreported—particularly when the victim is an adolescent or the abuse is sexual in nature. *NIS-3*, *supra*, at 2-1 – 2-3; AMA, *Adolescents as Victims of Family Violence*, *supra*, at 1851; AMA, *AMA Data on Violence Between Intimates*, *supra*;

neglect at disturbingly high rates.[7] Studies consistently show that approximately one-fifth to one-quarter of teenage age girls have been physically or sexually abused.[8] For example, one comprehensive study of adolescent girls found that one in five high school girls reported having been physically or sexually abused, that most abuse occurs at home, and that the abuser is usually a family member.[9] Other studies similarly have revealed that some 17% to 27% of girls were sexually abused during childhood.[10] Studies also consistently show that, in most

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Sandra Kaplan, *Adolescent Abuse*, 4 Adolescent Psychol. & Soc. Issues 65, 66 (1994).

7 Cathy Schoen et al., *The Commonwealth Fund Survey of the Health of Adolescent Girls* 1 (1997) (detailing prevalence and harm of sexual and physical abuse of teenage girls); AMA, *Adolescents as Victims of Family Violence*, *supra* note 6, at 1852 (reporting that adolescents represent a quarter of all reported cases of abuse or neglect and that, with respect to sexual abuse, girls are victims more often than boys).

8 *See* Schoen et al., *supra* note 7, at 1; David M. Fergusson, *Childhood Sexual Abuse & Psychiatric Disorder in Young Adulthood: Prevalence of Sexual Abuse & Factors Associated with Sexual Abuse*, 34 J. of Am. Acad. Child Adolescent Psychiatry 1355, 1358 (1996); David Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men & Women: Prevalence, Characteristics, & Risk Factors*, 14 Child Abuse & Neglect 19, 21 (1990); Nancy D. Kellogg et al., *Early Sexual Experiences Among Pregnant & Parenting Adolescents*, 34 Adolescence 293, 296 (1999); *see also* Arthur H. Green, *Child Sexual Abuse: Immediate & Long-Term Effects & Intervention*, 32 J. Am. Acad. Child Adolescent Psychiatry 890, 891 (1993).

9 Schoen, et al., *supra* note 7, at 1-2, 11, 13.

10 *Id.* at 1; Finkelhor et al., *supra* note 8, at 20-21 (27% of women); Fergusson *supra* note 8, at 1358 (17% of women); Kellogg et al., supra note 8, at 296 (reporting findings that 15 to 40% of girls under age 18 have been sexually abused or assaulted); *see also* Green, *supra* note 8, at 891 (reviewing literature).

cases of abuse, the perpetrator is a parent or a nonparental caregiver, such as a foster parent or other relative.[11]

The harms of abuse and neglect are both immediate and long-term. Physical abuse may include punching, kicking, shaking, throwing, burning, stabbing or choking,[12] and sexual abuse can include fondling, genital exposure, intimate kissing, forced masturbation, and oral, penile or digital penetration of the mouth, vagina or anus.[13] Immediate injuries range from bruises and broken bones to organ failure and even death, with estimates that some 565,000 minors per year receive serious injuries from abuse, including loss of consciousness, suffocation, broken bones, third degree burns and extensive second degree burns.[14] And the long-term effects include increased risks of alcohol and drug abuse, premature sexual activity, mental illness, depression, suicide attempts, sexual dysfunction and delinquent behavior.[15]

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[11] *NIS-3*, *supra* note 6, at 8-12 (over 70% of abused children were abused by parents); U.S. Dep't of Health & Human Servs., *Child Maltreatment 2003* 63 (2005) (parents were the perpetrators in 79.7% of cases of reported abuse or neglect) ("*Child Maltreatment 2003*"); Schoen et al., *supra* note 7, at 2 (57% of abuse of high school girl was committed by a family member); AMA, *AMA Data on Violence Between Intimates*, *supra* note 6, at 13 (87.1% of cases of child abuse involved one or both parents).

[12] *NIS-3*, *supra* note 6, at 2-10.

[13] *Id.*; Kathleen Coulborn Faller, U.S. Dep't of Health & Human Servs., *Child Sexual Abuse: Intervention & Treatment Issues* 12 (1993); Nat'l Research Council, *Understanding Child Abuse & Neglect* 57-77 (1993).

[14] *NIS-3*, *supra* note 6, at 3-13. Further, an estimated 1,000 to 1,500 children are killed by their parents every year. *Id.* at 3-12; *Child Maltreatment 2003*, *supra* note 11, at 55; *see also* Am. Med. Ass'n, *Physicians & Family Violence: Ethical Considerations*, 267 JAMA 3190 (1992) ("AMA, *Physicians & Family Violence*").

[15] *NIS-3*, *supra* note 6, at 3-13; Green, *supra* note 8, at 892; *see also* AMA, *Physicians & Family Violence*, *supra* note 14; Marija G. Dunn et al.,

B. Abused and Neglected Teens Are Particularly Likely To Have High-Risk Pregnancies

Abused and neglected teens are also at an increased risk of developing complications requiring them to have an emergency abortion. To begin with, abused and neglected teens are more likely than other teens to become pregnant while they are adolescents.[16] Indeed, nearly two-thirds of pregnant teenagers were physically abused or neglected in the United States while they were growing up, while over a third were subject to emotional abuse.[17] Thus, abused and neglected teens are more likely than other teens to become pregnant.

Origins & Consequences of Child Neglect in Substance Abuse Families, 22 Clinical Psychology Rev. 1063, 1076 (2002).

[16] Evvie Becker-Lausen & Annette U. Rickel, *Integration of Teen Pregnancy & Child Abuse Research: Identifying Mediator Variables for Pregnancy Outcome*, 16 J. of Primary Prevention 39, 50 (1995) (reviewing literature linking child abuse and neglect to teen pregnancy); Janice R. Butler & Linda M. Burton, *Rethinking Teenage Childbearing: Is Sexual Abuse a Missing Link*, 39 Family Relations 73, 76, 78 (1990) (54% of pregnant teens reported at least one sexually abusive experience); Kevin Fiscella et al., *Does Child Abuse Predict Adolescent Pregnancy?*, 101 Pediatrics 620, 620-24 (1998) (finding that sexual abuse is associated with a younger age at first pregnancy); Ellen C. Herrenkohl et al., *The Relationship Between Early Maltreatment & Teenage Parenthood*, 21 J. of Adolescence 291, 296 (1998) (over 95% of teenage mothers reported history of abuse); Jonathan D. Klein, Am. Acad. of Pediatrics, *Adolescent Pregnancy: Current Trends & Issues*, 116 Pediatrics 281, 282 (2005) (finding that 50% to 60% of pregnant adolescents had a history of sexual or physical abuse); Elizabeth M. Saewyc et al., *Teenage Pregnancy & Associated Risk Behaviors Among Sexually Abused Adolescents*, 36 Perspectives on Sexual & Reproductive Health 98, 100 (2004) (abused adolescents more likely than non-abused adolescents to become pregnant).

[17] Debra Boyer & David Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy & Child Maltreatment*, 24 Family Planning Perspectives 4, 8 (1992).

Abused and neglected teens are also more likely than other teens to need an emergency abortion because they tend to avoid or delay seeking needed medical care. According to one study, girls who were exposed to violence were less likely to have access to healthcare, with nearly half of the victims reporting that they had gone without needed medical care at some point in their lives.[18] Among other reasons for this problem, abused teens reported that they had concerns about confidentiality, they lacked health insurance, and they did not have support from their parents.[19] Neglected teens similarly lack parental support and are therefore likely to avoid or delay seeking needed medical treatment. Therefore, such teens are more likely to need emergency abortions: both because they are less likely to have sought prenatal care, which could have resulted in detection and treatment of conditions complicating their pregnancy before those conditions had progressed, and because they are reluctant to seek medical care even once a serious complication has developed.

In sum, abuse and neglect are significant problems in the United States, affecting millions of minors every year. Most pertinently here, teenagers who are abused or neglected are at an increased risk of becoming pregnant and also are at an increased risk of developing medical problems that could require an emergency abortion. As experience shows, these teens have a particular need for an emergency medical exception to any law—such as the New Hampshire Act—restricting access to reproductive health services. For this reason, as *amici* further explain below, the Act is plainly unconstitutional.

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[18] Schoen et al., *supra* note 7, at 4-5.

[19] *Id.*

II. THE NEW HAMPSHIRE ACT IS UNCONSTITUTIONAL BECAUSE IT SERIOUSLY ENDANGERS THE HEALTH OF ABUSED AND NEGLECTED TEENAGERS FACING MEDICAL EMERGENCIES

As this Court's precedents have established, an emergency medical exception is constitutionally required because there are some instances where an abortion is necessary "for the preservation of the life or health of the mother." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 879 (1992). The need for this emergency exception is nowhere more apparent than in the law that New Hampshire has enacted because, as written, the New Hampshire Act places abused and neglected teens in a very dangerous position. Were the Act to go into effect, an abused teen facing a medical emergency would be forced either: (1) to inform her parents about the pregnancy and risk the very serious abuse that notification might entail; or (2) to use the judicial bypass mechanism but face the health risks resulting from the delay that the bypass procedure would impose. And a neglected teen—to the extent she cannot rely on her parents to provide the required certification in time to protect her health—would be forced to wait for a judge to authorize the medical care that she needs. The State of New Hampshire has no legitimate interest in placing teenagers in this dangerous position.

A. Abused and Neglected Teenagers May Not Be Able to Notify a Parent About an Abortion Even in a Medical Emergency

A teen may comply with the Act if her parent or guardian certifies in writing that he or she has been informed of the planned abortion. N.H. Rev. Stat. Ann. § 132:26(I)(b). If the parent or guardian provides such a certification, a physician may perform an abortion immediately. Petitioner and its *amici* misguidedly argue that this exception to the Act's post-notification waiting period avoids any constitutional problems with the Act's lack of an emergency medical exception. Br. of

the United States as Amicus Curiae Supporting Petitioners ("S.G. Br."), at 24; *see also* Pet. Br. at 14. Indeed, in making this argument, Petitioner and its *amici* wholly ignore the fact that a significant number of teenagers cannot obtain a certification from their parents, even in a medical emergency, because they are the victims of abuse or neglect.

1. Some teens will not be able to obtain a certification because their parents are abusive

Some teens simply cannot notify their parents about a pregnancy because doing so would jeopardize their health. Indeed, it is well established that involuntary parental notification has very negative consequences for abused teens.[20] According to one study, a significant portion of the minors who did not inform their parents about a pregnancy had already been the victims of family violence.[21] Further, a majority of minors whose parents found out about a pregnancy without being voluntarily told by the minor reported adverse consequences, including at least six percent who reported being beaten, being forced to leave home, or having their parents' health affected.[22]

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[20] By contrast, most studies show that, regardless of whether parental notification or consent is mandated by law, the majority of minors seeking abortions *voluntarily* involve at least one parent in their decision, and among the minors who do not involve a parent, virtually all involved at least one responsible adult. Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 Family Planning Perspectives 194, 196 (1992); Robert Blum et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. of Pub. Health 619, 620 (1987); Laurie Zabin et al., *To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents' Communication With Parents & Parent Surrogates*, 24 Family Planning Perspectives 148 (1992). That many minors voluntarily notify their parents is no answer for those minors who cannot involve their parents because they are experiencing abuse at home.

[21] Henshaw & Kost, *supra* note 20, at 204 & table 7.

[22] *Id.*

These findings are consistent with studies showing that abused victims are in the best position to assess the risks of future violence and lethality.[23]

Notifying an abusive parent about a pregnancy is particularly dangerous for abused teens because pregnancy tends to increase the incidence and severity of abuse.[24] Significant numbers of pregnant teens report that they are abused during pregnancy in incidents that are often severe and frequently repeated.[25] In this way, pregnant teens' experience is consistent with that of other abused women, who consistently report increased vulnerability to abuse during pregnancy.[26] As a result, "it is reasonable to believe that some minors justifiably fear that

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[23] *See generally* Jill Davies, Greater Hartford Legal Assistance, *Safety Planning* (1997); *see also* Lauren Bennett Cattaneo & Lisa A. Goodman, *Victim-Reported Risk Factors for Continued Abusive Behavior: Assessing the Dangerousness of Arrested Batterers*, 31 J. of Community Psychol. 349, 365 (2003); Barbara J. Hart, Pa. Coalition Against Domestic Violence, *Safety & Accountability: The Underpinnings of a Just Justice System* (May 1998). When abused pregnant teenagers decide not to inform their parents, their determination rests upon a careful safety risk assessment based upon all that they know about their parents, and within the context of a history of violence. Davies, *supra*, at 1-2.

[24] Deborah L. Covington et al., *Severity, Manifestations & Consequences of Violence Among Pregnant Adolescents*, 28 J. of Adolescent Health 55, 57 (2001); Rebecca L. Burch & Gordon G. Gallup Jr., *Pregnancy as a Stimulus for Domestic Violence*, 19 J. of Fam. Violence 243, 245 (2004); Richard J. Gelles, *Violence & Pregnancy, Are Pregnant Women at Greater Risk of Abuse?*, 50 J. of Marriage & the Fam. 841, 844 (1988); *see also Casey*, 505 U.S. at 889 (quoting trial court's findings of fact related to domestic violence against women: "Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy").

[25] Covington et al., *supra* note 24, at 57 (2001).

[26] Burch & Gallup, *supra* note 24, at 245; Gelles, *supra* note 24, at 844.

they would be treated violently by one or both parents if they had to disclose their pregnancy to their parents."[27]

Courts repeatedly have recognized that abused minors face serious risks in informing their parents about an abortion. *See, e.g., Planned Parenthood of Blue Ridge* v. *Camblos*, 155 F.3d 352, 390, 390 n.3 (4th Cir. 1998) (Michael, J., concurring) (noting that there was evidence in the record that notification would expose a young women to risks of physical abuse and recounting a case of father who murdered his daughter upon learning of her intended abortion); *Planned Parenthood* v. *Miller*, 63 F.3d 1452, 1462 (8th Cir. 1995) (discussing case of father who assaulted clinic staff and forced his daughter to leave the clinic upon learning that she planned to have an abortion); *id.* (emphasizing that "a stressful, but non-abusive, parent-child relationship can become abusive or neglectful after the parent learns of the daughter's pregnancy or desire to have an abortion"); *N. Florida Women's Health & Counseling Servs., Inc.* v. *Florida*, 866 So. 2d 612, 617 (Fla. 2003) (discussing trial court findings that some minors have legitimate fears of physical or emotional abuse from mandatory parental notification); *Am. Academy of Pediatrics* v. *Lungren*, 940 P.2d 797, 829 (Cal. 1997) (referencing evidence establishing that "many minors who do not voluntarily consult their parents have good reason to fear that informing their parents will result in physical or psychological abuse to the minor (often because of previous abusive conduct or because the pregnancy is the result of intrafamily sexual activity)").

As the Court held in *Hodgson* v. *Minnesota*, 497 U.S. 417 (1990), minors who are victims of abuse or neglect must have an alternative to informing their parents about a pregnancy in order to obtain an abortion. *See id.* at 459-61 (O'Connor, J., concurring). With this backdrop, it is unrealistic, cruel and

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[27] AMA, *Mandatory Parental Consent to Abortion*, *supra* note 5, at 83.

dangerous to require abused teens to notify their parents about the need for an abortion, even if they are facing a medical emergency.

2. Some teens will not be able to obtain the certification because their parents are absent or neglectful

There also are some teens who will not be able to obtain the required certification in time to address a serious medical condition because their parents are absent or neglectful. For example, parents may be unable to respond to teens' emergencies due to a range of problems, such as mental health issues or drug or alcohol abuse.[28] Indeed, studies consistently show that neglectful parents are less likely to obtain medical care for their children—even in medical emergencies.[29] In this situation, a neglected teen may not be able to rely on her parents to sign a certification if she needs an immediate abortion to protect her health.

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[28] In 2003 alone, over 20,000 minors were reported to have suffered medical neglect—a situation where a caregiver failed to provide appropriate healthcare for a child. *Child Maltreatment 2003*, *supra* note 11, at 22; *see also* Dunn et al., *supra* note 15, at 1069, 1072 (reviewing literature on the impact of neglect and its connection to social problems such as substance abuse).

[29] Dunn et al., *supra* note 15, at 1069. For example, the U.S. Department of Health and Human Services has studied the refusal to provide needed health care or a delay in providing appropriate medical care as two of the seven varieties of physical neglect. NIS-3, *supra* note 6, at 2-16. The Department cited a parent who failed to provide a teen with needed medical for seizures as but one example of medical neglect. *Id.* at 2-17.

B. Abused and Neglected Teenagers Should Not Be Forced To Wait for a Judge to Authorize Necessary Medical Care

The only other option for abused and neglected teens facing a medical emergency is to use the judicial bypass procedure. But the judicial bypass procedure is not a substitute for an emergency medical exception. The delay inherent in this procedure is dangerous for teens facing a medical emergency.

As other *amici* are documenting, some teenagers will require immediate abortions to prevent serious health risks. *See* Br. of *Amici Curiae* Am. Coll. of Obstetricians and Gynecologists, et al. ("ACOG *Amici* Brief"). For instance, teens with preeclampsia may need an abortion in order to avoid liver and kidney failure, severe bleeding, vision loss and fluid in the lungs. *See* J.A. 23-26 (Decl. of Wayne Goldner, M.D. at ¶¶ 7-15); *see also* ACOG *Amici* Brief. For these teens, and others who are facing medical emergencies, a delay of even minutes or hours could have disastrous consequences. *See* ACOG *Amici* Brief. Thus, the judicial bypass simply does not solve the problem for abused or neglected teens who find themselves needing an emergency abortion.

Moreover, even putting aside the problems with delay, New Hampshire's judicial bypass procedure is not a safe option for abused teens because the Act does not guarantee their confidentiality.[30] In general, abuse victims are reluctant to

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[30] The lower courts did not decide the confidentiality issue raised by Respondents—having concluded that the Act is unconstitutional because it lacks a health exception and because it contains an inadequate life exception. *Planned Parenthood* v. *Heed*, 390 F.3d 53 (1st Cir. 2004); *Planned Parenthood* v. *Heed*, 296 F. Supp. 2d 59 (D.N.H. 2003). We respectfully submit that, should this Court reverse the decision below, the case should be remanded for further consideration of whether the Act is unconstitutional because it fails to guarantee the confidentiality of minors who use the bypass procedure. *See Zbaraz* v. *Hartigan*, 763 F.2d 1532, 1543, 1545 (7th Cir. 1985) (enjoining enforcement of law that

access the court system because of confidentiality concerns.[31] And the Act does little to alleviate this concern, stating only that the judicial bypass proceedings "shall be confidential," without offering any specifics whatsoever regarding the extent or form of that confidentiality. N.H. Rev. Stat. Ann. § 132:26(II)(b). The Act does not specify if the court records will be accessible to the public, what information will be revealed in the court records, or what information will be accessible to the public via electronic means. Given these omissions, it is quite feasible that an abusive parent who monitors a child's behavior could discover the child's efforts to obtain an abortion through the bypass procedure. Put another way, the Act effectively prevents abused teens from being able to use the judicial bypass because of the danger that their parents will learn about their attempt to obtain an abortion.

In short, the judicial bypass in not an adequate substitute for an emergency medical exception. As the Solicitor General has acknowledged, "constitutional difficulties may arise to the

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lacked "specific provisions to assure the minor's anonymity" until the Illinois Supreme Court enacts rules to "assur[e] the expeditious and confidential disposition of the judicial [bypass] hearings"), *aff'd by an equally divided Court*, 484 U.S. 171 (1987); *Thornburgh* v. *Am. Coll. of Obstetrics & Gynecologists*, 737 F.2d 283, 297 (3d Cir. 1984) (holding that the bypass procedure must contain "detailed provisions assuring confidentiality" and "may not rely solely on generally stated principles of . . . confidentiality"), *aff'd on other grounds*, 476 U.S. 747 (1986).

[31] Absent assurances of confidentiality, victims of abuse are unlikely to access medical, legal and other needed services due to a justified fear of retaliation from the abuser. *See, e.g.*, Joan Zorza, ABA Comm'n on Domestic Violence, *Confidentiality, in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* 64, 64 (Margaret B. Drew et al. eds., 2nd ed. 2004); Michael B. Bressman & Fernando R. Laguarda, *Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 Creighton L. Rev. 319, 343-345 (1997); Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 Fam. L.Q. 273, 299-302 (1995-1996).

extent the [New Hampshire Act] is applied in the specific context of emergency health risks, in which the emergency character of the situation would not allow time for the notification or judicial-bypass options to run their course." S.G. Br. at 8. The delay inherent in using the judicial bypass procedure endangers the health of teens in a medical emergency, and the Act's failure to ensure the confidentiality of minors who might seek to use the bypass procedure makes it an unrealistic and unsafe option for teens who are the victims of abuse.[32]

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[32] It also is unrealistic to expect that an abused or neglected teen will bring an as-applied challenge to the Act's notification requirement were she facing a medical emergency. Bringing an as-applied challenge would be even more difficult than using the judicial bypass process. In an as-applied challenge, as opposed to a judicial bypass procedure, a teen would not have access to court-appointed attorneys, nor would she have any statutory assurance of confidentiality or expedition. Further, she would have to bring a full blown lawsuit from complaint through discovery and possibly trial—a process that could take months if not years—as opposed to showing that she fits into a factual circumstance contemplated by the judicial bypass procedure. In addition, abused teens would face the problems that all victims of abuse face in accessing attorneys and using the legal system. *See generally* Stephanie Paul, ABA Commission on Domestic Violence, *Legal Services, in The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* 15, 15, 17 (Margaret B. Drew et al. eds., 2nd ed. 2004). All of this makes an as-applied challenge a completely unrealistic option for an abused teen in a medical emergency.

CONCLUSION

The New Hampshire Act's lack of an emergency health exception poses a major health risk to teens who are the victims of abuse and neglect, and the Act therefore is plainly and facially unconstitutional. For all of the foregoing reasons, *amici* respectfully submit that the decision of the First Circuit should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

KELLY A. AYOTTE,
ATTORNEY GENERAL OF NEW HAMPSHIRE,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR AMICI CURIAE NEW HAMPSHIRE STATE REP. TERIE NORELLI AND OVER ONE HUNDRED OTHER STATE LEGISLATORS SUPPORTING RESPONDENTS

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INTEREST OF AMICI

Amici curiae are all legislators in the State of New Hampshire.[1] Some are State Senators and some are State Representatives. They submit this brief in support of Respondents, seeking to affirm the judgment of the United States Court of Appeals for the First Circuit.[2]

During the debate on the New Hampshire Parental Notification Prior to Abortion Act ("the Act" or "PNA"), many of the amici advocated against passage of the bill that became the Act. They stressed the unconstitutionality of the bill and the importance of a medical emergency exception in order to protect the health of young women who might need an abortion. Amici were distressed when several supporters and sponsors of the bill expressed their desire to pass a bill with *no* exception to protect teens' health in medical emergencies. Despite the concerns, raised by amici and others, about the need to protect young women's health, the bill's supporters made clear that they wanted to test whether the courts – especially this Court – would allow such a statute to pass constitutional muster. The bill's supporters insisted on a bill with no exceptions except where the woman would die before the 48-hour waiting period expired.

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[1] A complete list of all 153 amici is attached hereto in the Appendix to this Brief.

[2] Amici submit this brief in support of Respondents. Counsel for all parties consented to amici's filing this brief, and copies of letters so indicating are being filed with this brief. This brief was authored by amici and their counsel; no part of it was authored by any other party. Nor has any party contributed financially to its production.

Amici wish to share their legislative perspective with the Court.[3] First, based on amici's knowledge of the New Hampshire Legislature, amici believe that a majority of the Legislature might well have preferred to have *no bill at all* rather than a bill containing an emergency health exception.

In addition, amici's legislative perspective includes a desire to protect the legislative process from possible judicial encroachment. If the Act as it is written is unconstitutional, as we think it is, then amici would stress that it should be the legislators, not the courts, who decide whether a new statute should be written and how to write its provisions in such a way as to make it both constitutional and politically acceptable to a majority of the State's elected representatives. This legislative perspective is one that amici uniquely possess; the parties are, of necessity, viewing this case from a different point of view.

SUMMARY OF ARGUMENT

For more than three decades, this Court has consistently held that laws restricting access to abortion are unconstitutional unless they contain a health exception to protect women's health and lives. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 879-80 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000). In direct contravention of this constitutional mandate, the New Hampshire Legislature chose to impose

[3] The vast majority of amici participated first-hand in the legislative process that resulted in the Act at issue in this case. Others are currently serving in the Legislature.

a major restriction – imposing a 48-hour delay after parental notification – without including an exception where a prompt abortion is necessary to protect a young woman's health. For this reason alone, the Act is unconstitutional.

Because the Act is unconstitutional, and because it would be inappropriate for this Court to rewrite the Act in order to "save" it, this Court should facially invalidate it. In prior decisions, both pre-*Casey* and post-*Casey*, this Court has facially invalidated statutes that the Court had held to be unconstitutional because they placed an undue burden on a woman's right to obtain an abortion.

The Court should certainly not try to "save" the statute by judicially crafting new statutory provisions that the New Hampshire Legislature did not see fit to include in the statute that it voted on. Writing and rewriting statutory language is emphatically the province of the legislative branch of government, in this case the *state* legislative branch; it is not the province of the judicial branch, especially the *federal* judiciary.

Finally, the Act's judicial bypass provision was not intended to supply the medical emergency exception. The bypass provision, by its terms, applies only to a minor who "elects" not to notify her parents, and says nothing about the teen who *wants* to notify her parents but for one of many reasons is unable to. Nor does it address the situation in which a minor needs an abortion in less than 48 hours to avoid serious health repercussions and has notified her parents, but the parents are unable promptly to "certify in writing that they have been notified."

ARGUMENT

I. THE STATE WAIVED THE ARGUMENT THAT IT WAS NOT REQUIRED TO INCLUDE AN EMERGENCY HEALTH EXCEPTION IN THE STATUTE.

The State did not argue, in the district or circuit courts, that it was not required by the Constitution to include an emergency health exception in the Act. Instead, the State contended, in those courts, that *it met that requirement* by means of other unrelated statutory provisions that had already been on the books. Having failed to preserve the argument the State is now raising – that the Act would be constitutional even with *no* emergency health exception – the State cannot now be heard in this Court to raise an argument it waived in the district and circuit courts.

This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *See City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (finding "considerable prudential objection" to doing so, even though there is no jurisdictional bar to reaching such questions). In *Kibbe*, the petitioner had failed to raise its objection in the *trial* court. Here, the State of New Hampshire failed to raise its present argument in *either* the district court *or* the court of appeals. This argument should not be considered by this Court where the State failed first to give the "lower courts" an opportunity to address the parties' contentions. *See Kibbe*, 480 U.S. at 259.

II. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S HOLDING THAT THE ACT IS UNCONSTITUTIONAL BECAUSE IT LACKS AN EMERGENCY HEALTH EXCEPTION.

As the Respondents' brief more fully explains, the circuit court correctly held the Act unconstitutional because it does not include an exception for emergency situations where the young woman's health will be endangered, if she cannot get a prompt abortion. *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 62 (1st Cir. 2004). The primacy of women's health has been a part of this Court's jurisprudence for more than three decades. The Court has required an emergency health exception to statutory abortion restrictions, including statutes imposing a waiting period or other delay before a woman may obtain an abortion (as well as outright prohibitions on a woman's right to an abortion).

For 32 years – from *Roe* to *Casey* to *Stenberg* – the *sine qua non* of validity for abortion regulations has been held to be an exception to protect the health of the woman. In *Roe* itself, the Court held that even post-viability bans must contain a health exception. *Roe*, 410 U.S. at 164-65. Indeed, this Court has explicitly held that the type of abortion restriction contained in the New Hampshire Act – a mandatory *delay* (48 hours after parental notification) before an abortion may be performed – must contain an exception for circumstances where a woman needs a prompt abortion to protect her health. *Casey*, 505 U.S. at 879-80, 886.

This Court held, in *Casey*, that Pennsylvania's parental involvement and waiting period restrictions would have been unconstitutional, if the statute *had not* contained an exception permitting an immediate abortion if

necessary to prevent significant health risks; the Court reasoned that "*the essential holding of Roe forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health.*" *Id.* at 880 (emphasis added). However, the Court found that, unlike the New Hampshire Act, the Pennsylvania law *did* include an exception for medical emergencies that was not limited to life-threatening situations. *Id.* at 879 (recognizing statutory exception for medical emergency "for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function"). Critical to this Court's conclusion was the fact that the court of appeals had construed Pennsylvania's medical emergency exception as "assur[ing] that compliance with [the] abortion regulations would not *in any way* pose a significant threat to the life *or health* of a woman." *Id.* at 879-80 (emphasis added). Because of this medical emergency exception, the Court found that the statute's waiting period did not place a substantial obstacle in the path of a woman seeking an abortion. *Id.* at 886. *See also Planned Parenthood v. Owens*, 287 F.3d 910, 927 (10th Cir. 2002) (holding a Colorado parental notification law "unconstitutional because it fail[ed] to provide a health exception as required by the Constitution of the United States"); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 203 (6th Cir. 1997) ("any abortion regulation that might delay an abortion must contain a valid medical emergency exception").

Applying these well-established constitutional standards, the circuit court properly concluded that the New Hampshire Act is fatally flawed. *Heed*, 390 F.3d at 60-62. Unlike the statute in *Casey*, the New Hampshire Act

contains *no exception* that would protect a young woman's health in situations where she is not facing imminent death but delaying her abortion would put her health at serious risk.[4] For this reason alone, the circuit court's decision must be affirmed.

In addition, the New Hampshire Act imposes a forty-eight-hour waiting period after parents have been notified. As this Court made clear in *Casey*, such a delay is unconstitutional, in the absence of an emergency health exception. *Casey*, 505 U.S. at 880, 886. If a waiting period of twenty-four hours is unconstitutional without an emergency health exception, *id.*, then the New Hampshire Act's forty-eight-hour waiting period surely requires an emergency health exception.

The requirement of an emergency health exception will be more fully discussed in the brief of the respondents, and has been explained in the First Circuit decision. Therefore, we will not elaborate on it here. Instead, we turn to the question of remedy: given that the New Hampshire statute fails to include a medical emergency

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[4] As the *undisputed evidence* makes clear, the lack of such an exception will cause minors to suffer serious and unnecessary injuries to their health. For example, some teenagers with preeclampsia – a condition that occurs most frequently in young women pregnant for the first time – risk substantial harm to their kidneys, liver, and vision if an abortion must be delayed to comply with the Act's requirements. Goldner Affid. ¶¶ 8-9, Joint App. 23-24. Similarly, delaying an abortion for a minor with premature rupture of membranes may cause significant and permanent harm to the young woman's health, including infertility, a lifetime of chronic pelvic pain, and an abdominal abscess. *Id.* ¶¶ 10-11, Joint App. 24-25; *see also id.* ¶¶ 7-15, Joint App. 23-26 (describing other conditions where a prompt abortion is needed to protect a woman's health from significant and permanent damage).

exception, and is therefore unconstitutional, what should the courts do about it?

III. THE CIRCUIT COURT CORRECTLY HELD THAT NEW HAMPSHIRE'S UNCONSTITUTIONAL STATUTE MUST BE *FACIALLY INVALIDATED*.

A. Facial Invalidation Has Been the Remedy in Prior Decisions, Both Pre-*Casey* and Post-*Casey*, Where a Statute Restricting Abortion Was Held Unconstitutional.

In a number of prior cases, both pre-*Casey* and post-*Casey*, this Court has facially invalidated statutes restricting access to an abortion, as the remedy for the restriction's unconstitutionality. *See, e.g.*, *Stenberg*, 530 U.S. at 929-30; *Thornburgh v. American Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 769-71 (1986), *overruled in part on other grounds, Planned Parenthood v. Casey*, 505 U.S. 833 (1992).[6]

Just last year, this Court "recognized the validity of facial attacks" in settings involving, *inter alia*, abortion (but rejecting facial attacks "outside these limited settings"). *Sabri v. United States*, 541 U.S. 600, ___, 124 S.Ct. 1941, 1948-49 (2004).

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[6] *See also Casey*, 505 U.S. at 895; *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 482 (1983); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426 (1983) (*Akron I*), *overruled in part on other grounds, Casey*, 505 U.S. 833 (1992); *Colautti v. Franklin*, 439 U.S. 379, 401 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69, 74-78, 82-84 (1976); *Doe v. Bolton*, 410 U.S. 179, 201-02 (1973) (all facially invalidating abortion restrictions).

B. The Courts, Including This Court, Should Not Put Themselves in the Position of Rewriting Statutes, Even If They Would Do So In Order to "Save" a Statute's Constitutionality.

1. It Would Be Inappropriate for the Courts to Intrude on the Province of the Legislature

It is fundamentally the province of the legislative branch, not the judiciary, to write all of the provisions of any given statute. As this Court stated in a different context:

> Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 483 (1992).

What this Court said about Congress in *Cowart* is even more true of state legislatures such as New Hampshire's here.[6] "[I]t is not the function of a court 'to

[6] To say, as we do here, that this Court should refrain from any inclination to rewrite the New Hampshire parental notification act in order to "save" it, does not mean that the Court never has any role in interpreting statutes after their adoption by the legislative branch. However, it is one thing for a court to interpret an *ambiguous* provision by applying the principles of statutory construction. It is quite another thing, after finding a statute unconstitutional – because it includes *no provision* to protect a woman from serious health repercussions – for a court to *draft its own language* to insert in the statute in order to cure the constitutional defect.

hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State]." *Caban v. Mohammed*, 441 U.S. 380, 393 n.13, 394 (1979) (striking down a state statute as unconstitutional based on "'overbroad generalizations' in gender-based classifications").

Amici have, among them, many years of experience as legislators. They know all too well the truth of the old saw that "enacting legislation is like making sausage, and watching it happen is not for the squeamish." The legislative process is a constant give and take. Alliances are formed and then dissolved, new ones formed and then rearranged. Draft bills are amended – often many times – and, once approved by one legislative house, bills are frequently approved by the second house in a vastly different format. Committees of conference negotiate between the House and Senate versions, and sometimes come up with a bill that is altogether different from either of them. The conference committees might even negotiate approval of the Senate version of Bill A in exchange for the House version of Bill B, on an entirely different subject. In the end, many compromises and trade-offs are made before the final bill becomes law. It is impossible to predict, at the outset, how all the uncertainties will play out.

This "sausage factory" is not pretty. Yet it is an aspect of our democratic, three-branched government that is best left to the legislature. Courts acting in the abstract cannot and should not substitute their analysis of how a constitutional statute *might have been* crafted *if* the Legislature had collectively worked through their different interests and tried to produce such a result. This is why courts have refused to tread upon "the province of the Legislature" by

rewriting an unconstitutional law in order to "save" it. *See Caban*, 441 U.S. at 393 n.13.

This is as true in New Hampshire as it is in the federal courts.[7] Just last year, the New Hampshire Supreme Court refused to "supply a limiting construction" to a statute held unconstitutional; the court could not envision a construction that "would allow [the court] to limit the scope of the statute without *invading the province of the legislature*." *State v. Brobst*, 151 N.H. 420, 857 A.2d 1253 (2004) (emphasis added). Guarding against such an invasion has a long history in New Hampshire. In *Williams v. State*, 81 N.H. 341, 353, 125 A. 661, 667 (1924), *overruled in part on other grounds, Amoskeag Trust Co., et al. v. Trustees of Dartmouth College*, 89 N.H. 471, 200 A. 786 (1938), the Court rejected a graduated tax as unconstitutional, but then refused to judicially impose a flat tax at any particular rate because to do so "would be *an act of legislation not of construction*. The legislature intended to substitute a new system as a whole, and as all the provisions cannot be carried into effect and as it is impossible to tell what part the legislature would have adopted independently, the whole section is void." (Emphasis added.) *See also Opinion of the Justices*, 108 N.H. 268, 275, 233 A.2d 832, 836 (1967) (voiding "the whole amendment," where it was "impossible for [the Court] to determine whether the Legislature would have enacted any part of the amendment if the whole or a major part of it could not

[7] This Court is "bound to accept the interpretation of [New Hampshire's] law by the highest court of the State." *Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (quoting *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n*, 426 U.S. 482, 488 (1976)).

[because of constitutional prohibitions] be carried into effect").

"Courts have no right to redraft legislation to make it conform to an intention not fairly expressed therein." *Ahern v. Laconia Country Club*, 118 N.H. 623, 625, 392 A.2d 587, 588 (1978); *State v. Johnson*, 134 N.H. 570, 578, 595 A.2d 498, 503-04 (1991) (same). It is not for a reviewing court "to add terms to the statute that the legislature did not see fit to include." *Ahern*, 118 N.H. at 625, 393 A.2d at 588. The question "is not what the legislators ought to have done when they originally passed [a particular statute], or what they would have done had they thought of it." *Sigel v. Boston & Maine R.R.*, 107 N.H. 8, 23, 216 A.2d 794, 805 (1966).

In the instant case, there are many different ways that any particular provision – including a medical emergency exception – could be written. It is "impossible to tell" which of those possibilities the legislature would have chosen as its fallback position if it knew that the statute as enacted would be held unconstitutional. It is not appropriate for this Court to choose among those various possibilities and do the legislature's job for it. *See Williams*, 81 N.H. at 353, 125 A. at 667.

2. The Legislature that Passed the Act Might Well Have Refused to Pass a Parental Notification Act with Whatever Amendment this Court Might Write in an Effort to Render the Act Constitutional.

The courts' intrusion on the province of the Legislature would be especially inappropriate with respect to the particular legislative choice made by the New Hampshire

Legislature when it enacted the parental notification law. If the Legislature were faced with the choice of facial invalidation or reading in a medical emergency exception, there is significant doubt as to which choice the Legislature would have made. Indeed, there is reason to believe that the Legislature would have voted for no law at all rather than for one with a medical emergency exception.

A number of legislators – including the Act's key sponsors – made clear that they would have preferred to have *no law* rather than a law that contains a medical emergency exception in it. They strongly opposed inclusion of a medical emergency exception on the ground that they wanted to test the law, and in particular wanted this Court to adjudicate the issue of whether a medical emergency exception would be required in a parental notification statute.[8]

At the time they enacted the parental notification act, the New Hampshire Legislators were well aware of the thirty years of Supreme Court law on the subject of abortion. And the Legislators were well aware of – indeed some of the Act's sponsors were contemptuous of – this Court's decisions protecting maternal health. For example, Rep. Phyllis Woods, one of the lead sponsors of the Bill, stated

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[8] The amicus briefs supporting the state in this case have expressed the same view as many of the sponsors of the New Hampshire statute: they do not think a medical emergency exception should be a part of an abortion regulation law; they believe such exceptions are so broad as to reduce the effectiveness of the abortion regulation; and they desire to restrict abortions to the rare cases where the woman's very life is endangered. The amicus briefs thus support the argument that the New Hampshire legislators who voted to pass the parental notification act made a purposeful decision to enact a law that did *not* contain a medical emergency exception.

clearly that lawmakers *intentionally* left out a health exception. *See* New Hampshire Public Radio News, "Parental Notification Law Faces Challenge," Nov. 17, 2003, available at http://www.nhpr.org/node/5396/ (copy attached *infra* at App. 4). *See also* statement by Rep. Fran Wendelboe, quoted in the Portsmouth Herald, December 31, 2003, available online at http://www.seacoastonline.com/2003news/12312003/news/68017.htm (copy attached *infra* at App. 8) ("We didn't mistakenly forget to put in a health exception. We purposely crafted a bill without an exception.").[9] These sentiments pervaded the public discussion of New Hampshire's parental notification act.

The Legislators who supported passage of the Act knew very well how to draft language that would have provided an emergency health exception;[10] yet they chose not to include such language in the Act. *Compare Thornburgh*, 476 U.S. at 771 ("It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so.... It specifically provided a medical-emergency exception with respect to [several restrictions]," yet did not include one in the provision at issue. "We necessarily conclude that the

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[9] Many of the present amici participated in the debates on the Act, and expressed dismay at their colleagues' expression of such contempt for the rule of law and such insensitivity to the very real possibility that the absence of an emergency health exception could create serious health consequences for vulnerable young women.

[10] Indeed, in several prior years, bills had been introduced in the Legislature to require parental notification before minors could obtain an abortion, and each of those prior bills contained an exception where necessitated by a health emergency. *See, e.g.*, S.B. 442, 1998 Session (N.H. 1998); H.B. 1278, 2002 Session (N.H. 2002); H.B. 1380, 2002 Session (N.H. 2002).

legislature's failure to provide a medical-emergency exception in [the statute] was intentional.").

The Act passed the New Hampshire Legislature by a narrow margin in each house. The vote was so close that a change of one vote in the Senate and a handful of votes in the House would have made the difference between the present law and no law at all. In the face of doubt, the courts should steer a wide berth around any action that could be construed as doing the legislature's job for it, especially where a majority of the legislature might not support the statute as the court might rewrite it in order to render it constitutional. The federal courts certainly should not be in the business of writing a new state law and assuming that the legislature would have passed it in the form that the courts have rewritten it.

When a court is "not sure whether the legislature would have enacted" one provision of a statute "in the absence of all of the unconstitutional provisions," the court "must leave that question to the legislature," and *void the entire statute*. *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 531, 464 A.2d 288, 299 (1983); *Carson v. Maurer*, 120 N.H. 925, 946, 424 A.2d 825, 839 (1980) (same). Similarly, here, the Court cannot be "sure whether the legislature would have enacted" the Act if its language were rewritten by the Court in a way that would render it constitutional; therefore the Court "must leave that question to the legislature," and void the entire statute. *Heath*, 123 N.H. at 531, 464 A.2d at 299.

Accordingly, amici urge the Court to affirm the First Circuit's judgment facially invalidating the Act. If the legislature, at some later date, chooses to enact a new statute with different provisions, then the courts will have

an opportunity to decide whether that new statute is constitutional, according to the law as this Court has defined it. New Hampshire's Parental Notification Prior to Abortion Act should be facially invalidated.

IV. THE JUDICIAL BYPASS PROCEDURE WAS NOT INTENDED TO SUPPLY THE MEDICAL EMERGENCY EXCEPTION.

The Petitioner argues in her brief, at 20-23, that the judicial bypass procedure set forth in the Act "adequately protects the life and health of the mother. . . . " This argument was rejected by the district court:

> The Attorney General also argues that the judicial bypass provision of the Act would allow an abortion, without notification, to protect the health of a pregnant minor. Even with the provisions for expediting such proceedings, the judicial bypass process necessarily delays an abortion in a health emergency. Dr. Goldner states in his declaration, which is not opposed by the Attorney General, that certain medical conditions during pregnancy require immediate abortion to protect the health of the mother and that any delay would jeopardize her health. The Attorney General has not explained how the judicial bypass provision would address the need for an immediate abortion to protect the health of the mother, and the provision on its face is insufficient to meet such a need. Therefore, the judicial bypass process does not save the Act from the lack of a constitutionally required health exception.

Planned Parenthood of Northern New England v. Heed, 296 F. Supp. 2d 59, 66 (D.N.H. 2003). Petitioner's argument was also rejected by the court of appeals:

> Finally, the Attorney General argues that the Act's judicial bypass mechanism allows prompt authorization of a health-related abortion without notice. The Act provides that such proceedings "shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay," provides minors 24-hour, 7-day access to the courts, and provides for expedited appeal. RSA 132:26, II(b)-(c). However, the Act allows courts seven calendar days in which to rule on minors' petitions, and another seven calendar days on appeal. Delays of up to two weeks can therefore occur, during which time a minor's health may be adversely affected. Even when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk. Due to this delay, the Act's bypass provision does not stand in for the constitutionally required health exception. *See Thornburgh*, 476 U.S. at 768-71, 106 S.Ct. 2169 (finding statute facially invalid for failing to provide health exception to delay caused by awaiting presence of second physician).

Heed, 390 F.3d at 62. The Petitioner's argument in this regard is no more persuasive before this Court.

The judicial bypass procedure is set forth in RSA 132:26, II. It burdens a pregnant minor who does not wish to notify her parents with the obligation to seek judicial authorization for an abortion. While requiring decisions on such requests to be reached "promptly and without delay," the statute provides no specific timeframe for medical

emergencies, which might require prompt medical action in order to avoid significant and permanent harm to the pregnant minor. *See supra* at 7, n.4. Instead, the judicial bypass provision only establishes a deadline for decision of seven (7) days from the filing of the petition (II(b)), and another seven (7) day period from the docketing of an appeal from the denial of a petition (II(c)). While the state judiciary will certainly attempt to act "promptly," statutory compliance means that, even if the pregnant minor acts immediately throughout, fourteen (14) days could pass in the judicial proceeding. Such a structure could not have been intended to supply a medical emergency exception.

In addition, although the Act purports to provide access to the courts "24 hours a day, 7 days a week," such access outside of normal hours during which trial courts are open is difficult at best, and often impossible. It may well be that law enforcement and sophisticated parties with significant resources may have the ability to access the justice system "after hours," but this would not be the reality for an individual petitioner inexperienced in legal matters and of limited means. Moreover, the Act provides no funding for the expedited procedure and appointed counsel right it creates, and there is nothing in the record to suggest that the New Hampshire state court system is able to respond to this additional responsibility as dictated by the Act. The New Hampshire legislature was assumedly aware of these issues, which further evidences the fact that the judicial bypass procedure was not intended to substitute for a medical emergency exception.

Finally, the language of the statute itself demonstrates its inapplicability to medical emergencies. As noted, the procedure contemplates the "pregnant minor elect[ing] not to allow notification of her parents," RSA 132:26, II, a concept bearing no relation to the existence of

a medical emergency for which the minor is willing to notify her parents, but they are unwilling, unable, or unavailable to provide the written certification of notice to allow the abortion to proceed immediately. *See* RSA 132:26, I(b). Likewise, the statute's language about "best interests" – requiring that a judge "determine whether the performance of an abortion upon [a pregnant minor] *without notification of her parent* . . . would be in her best interests" – again bears no relation to the case in which the minor *does* notify her parents but the parents are unable, unwilling, or unavailable to immediately provide the necessary certification. RSA 132:26, II (emphasis added). Again, it is clear that the judicial bypass procedure is intended to apply only to the circumstance of the pregnant minor *electing* not to notify her parents. It is equally clear that the bypass procedure was *not* intended to deal with medical emergencies, and that it fails to provide the constitutionally required mechanism for dealing with such emergencies.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the judgment of the First Circuit and to facially invalidate New Hampshire's Parental Notification Prior to Abortion Act.

Respectfully submitted,

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NH Public Radio

PARENTAL NOTIFICATION LAW FACES CHALLENGE

Reported by **Dan Gorenstein**
on Monday, November 17, 2003.

[Picture Omitted In Printing]

Pro-choice advocates are challenging the state's new law that requires minors to notify parents before getting an abortion.

Earlier today/Yesterday they filed a long-expected suit in federal court.

New Hampshire Public Radio's Dan Gorenstein reports.

A rough transcript follows:

Abortion rights activists argue New Hampshire's version of the law is unconstitutional.

Nearly 30 states require some form of parental involvement in abortion cases.

But the plaintiffs say many of those states remove the requirement if the young woman's health is at risk.

Northern New England's Planned Parenthood Jennifer Frizzed says this state didn't include the same language.

Track 3

1:56 the law we challenge today dangerously interferes with doctors ability to preserve the health of patients, the law requires a 48 hr. delay, even when the delay would cause serious and irreparable harm to the young woman, including, infertility, seizures and kidney or liver damage.

The plaintiffs believe without a health exemption, the courts will strike down the law.

And have asked the court to block it from taking effect on January 1st.

Republican Representative Phyllis Woods can't think of a worse outcome.

Woods, one of the lead sponsors of the legislation, says lawmakers intentionally left out a health exception.

She says that provision would make for a totally useless law.

3:08 the health exception is so broadly defined that in most cases, it is construed to be emotional, or financial health, by virtue of being pregnant a woman's health is compromised . . . that are not serious reasons to terminate a pregnancy.

Citizens for Life executive director Roger Stenson expected a court challenges.

But he's optimistic.

He points to a US Supreme Court decision upholding a Minnesota law that didn't provide a health exception.

3:50 the proof of the pudding is in the eating. So I would recommend for anyone's consumption a reading fo [sic] the Supreme Court decision on the parental notice statue in Minnesota . . . that is in black and white, and it can not be obfuscated by wild execrations from abortion providers.

Plaintiffs, however, cite their own legal precedent.

A recent federal court in Colorado threw out that state's law because it failed to protect a woman's health.

Lead attorney for the New Hampshire Plaintiffs, the ACLU's Jennifer Dalven.

Track 4

:04 the SC has made it very clear for states, that you may pass a parental notice law for abortion, but you must have an exception to protect the health and life of young women, so you must have an exception that allows a doctor to proceed with an immediate abortion when in good faith in their medical judgment, they believe a delay will result in the harm of a young woman.

Harvard Professor of Health Policy and Law Michelle Mellow says there are two seemingly conflicting decisions because the court's considered two separate questions.

The Minnesota case, says the professor, focused on whether 48 hours was a reasonable time for a young woman to discuss having an abortion with her parents.

In the Colorado case, she says the analysis focused on whether a woman's health would be at risk over a 48 hour waiting period.

Mellow said, in light of the Supreme Court's ruling in the Minnesota case, there are two reasons for plaintiff optimism.

3:03 number one we have a slightly different membership on the court. And number two the papers in this case seems to have done a better job of fleshing out the medical issues associated with a waiting period.

After Colorado's parental notification law was nullified, the legislature passed a similar law that included the health provision.

When asked whether the same would happen in New Hampshire, a member of state Senate leadership demurred.

He said, with the legislature so evenly divided, it could go either way.

For NHPR News, I'm DG.

Seacoastonline [LOGO]
The Source for the Seacoast

10-11-2005

STATE WILL APPEAL RULING ON ABORTION

By Stephen Frothingham
Associated Press

CONCORD – The state plans to appeal a federal judge's ruling that struck down New Hampshire's law requiring parental notice before a minor could get an abortion, the state attorney general said Tuesday.

"It's an important issue that should be reviewed" by the 1st U.S. Circuit Court of Appeals in Boston, Attorney General Peter Heed said.

The law was to have taken effect today. On Monday, U.S. District Judge Joseph DiClerico in Concord said it was unconstitutional because it lacked an exception to protect the minor's health.

Gov. Craig Benson, a strong supporter of the law, said he backed Heed's decision.

"It gives us an opportunity to push this up to a higher court, where more judges will rule on this, not just one single judge," Benson said.

Conservative lawmakers had urged Benson to appeal the decision rather than weaken the law by adding a health exception.

"We didn't mistakenly forget to put in a health exception. We purposely crafted a bill without an exception," said Fran Wendelboe, R-New Hampton.

She said a health exception would be an "open door."

"It would pretty much mean you would have no parental notice at all. Because who makes the decision about what is a health exception? The abortionist, who is already 100 percent gung-ho to do an abortion," she said.

Benson said a health exception wouldn't necessarily weaken the law. "It depends on how it's written," he said.

Heed said the appeals court has never ruled on a parental notice law.

The law would have required abortion providers to notify at least one parent at least 48 hours before performing an abortion on a minor. The parent would not have had to approve the abortion.

Alternatively, the girl could have asked a judge for permission, which the judge was required to grant if the girl was mature enough or the abortion was in her best interest.

DiClerico was unimpressed with the state's argument that judges could approve abortions in emergencies.

A federal appeals court in Denver last year ruled that a similar Colorado law was unconstitutional because it provided no exceptions for health emergencies.

"The judge clearly has substantial precedent that supports his decision," Heed said. "But we believe there is precedent on our side."

He said he would file the notice of appeal before the Jan. 27 deadline.

The Legislature may still try to change the law. But the bill passed by very narrow margins last May and any proposed changes would likely fracture the unusual

alliances that helped it pass. The Legislature had defeated similar legislation in previous years.

Supreme Court, U.S.
F. E.
OCT 12 2005
OFFICE OF THE CLERK

(29)

No. 04-1144

In the

Supreme Court of the United States

KELLY A. AYOTTE, Attorney General of the State of New Hampshire, in her Official Capacity,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF ORGANIZATIONS COMMITTED TO WOMEN'S EQUALITY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CORRECTED COPY

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October 12, 2005

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New York Times v. Sullivan, 376 U.S. 254 (1964) 22

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United States v. Salerno, 481 U.S. 739 (1987) ..... *passim*

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Other Authorities

Anne L. Alstott, *No Exit: What Parents Owe Children and What Society Owes Parents* (2004) 11

Holli Ann Askren & Kathaleen C. Bloom, *Postadoptive Reactions of the Relinquishing Mother: A Review*, 28 J. Obst. Gyn. & Neonatal Nursing 395 (1999) 9

Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 Am. Soc. Rev. 204 (2001) 11

Centers for Disease Control and Prevention, *Abortion Surveillance—United States, 2001, in Surveillance Summaries*, 53 Morbidity & Mortality Wkly. Rep. (No. SS-9) (Nov. 26, 2004) 24

Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235 (1994) 16, 22, 24

Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321 (2000) 16, 23

David H. Gans, *Note: Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 Yale L.J. 1875 (1995) 7

Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985) 9

D.H., *On Producing Abortion: A Physician's Reply to the Solicitations of a Married Woman to Produce a Miscarriage for Her*, 17 Nashville J. Med. & Surgery 200 (1876) 12

Stanley K. Henshaw, M.D., *Unintended Pregnancy and Abortion: A Public Health Perspective, in A Clinician's Guide to Medical and Surgical Abortion* (Maureen Paul, M.D. ed., 1999) 3

Sandra L. Hofferth *et al.*, *The Effects of Early Childbearing on Schooling Over Time*, 33 Fam. Plan. Persp. 259 (2001) 11

Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 Wake Forest L. Rev. 513 (2003) 9

Daniel Klepinger *et al.*, *How Does Adolescent Fertility Affect the Human Capital and Wages of Young Women?*, 24 J. Hum. Resources, 421 (1999) 11

Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984) 9

National Adoption Information Clearinghouse, U.S. Administration for Children & Families, *Voluntary Relinquishment for Adoption, Numbers and Trends* (2005) 9

D.A. O'Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 Transactions Am. Med. Ass'n 239 (1871) 12

Frances Olsen, *The Supreme Court, 1988 Term—Comment: Unraveling Compromise*, 103 Harv. L. Rev. 105 (1989) 13

Montrose A. Pallen, *Foeticide, or Criminal Abortion*, 3 Med. Archives 193 (1869) 13

Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992) 5, 12

Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. Gender Race & Justice 411 (2002) 11

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are organizations committed to attaining full legal and social equality for women. *Amici* agree with this Court that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood v. Casey,* 505 U.S. 833, 856 (1992). *Amici* submit this brief to the Court to highlight the importance of the right to choose abortion to women's equality, and to demonstrate how abandonment of overbreadth doctrine in analyzing abortion restrictions would threaten that equality. The names and individual statements of interest of the *amici* are contained in the Appendix to this brief.[1]

SUMMARY OF ARGUMENT

Women's constitutional right to decide for themselves when and whether to have children is of central importance not only to their individual privacy interests, but also to their ability to achieve equality. Government restrictions on access to abortion that interfere with this right impose on women physical risks that they would otherwise avoid. Restricting women's choice in childbearing may impose a role of the State's choosing on women, a result contrary to this Court's disapproval of government action that enforces sex role stereotypes. Moreover, when the role that is imposed, that of motherhood, is unwanted, it may significantly inhibit women's ability to participate fully in civic life. Thus, invalidation of abortion restrictions that prevent women

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[1] The parties' letters consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation of this brief.

from exercising choice in childbearing is necessary to promote women's equality. (Point I, *infra*.)

In light of the privacy and equality interests that are at stake, this Court's application of overbreadth analysis to judge facial challenges to restrictions on the right to choose abortion is not only justified, but vital to avoid chilling its exercise. To abandon overbreadth review in favor of the standard drawn from *United States v. Salerno*, 481 U.S. 739 (1987), would be virtually to preclude facial challenges to even the broadest abortion restrictions. Permitting only as-applied challenges to such restrictions would severely chill women's exercise of their constitutional right to end a pregnancy. Just as overbreadth analysis protects the public good of free speech, so too does it protect the public good of women's equality from the corrosive impact that unrestrained legislative enactments against abortion would have. The *Salerno* standard, by contrast, would invite such enactments, casting women's constitutional right to choose and the interests it serves into a continuous state of insecurity. (Point II, *infra*.) *Amici* therefore urge this Court to uphold the decision below.

ARGUMENT

I. RESTRICTING THE RIGHT TO CHOOSE WHEN AND WHETHER TO HAVE CHILDREN IMPEDES WOMEN'S EQUALITY

"The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. [The State may not] insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role . . . ." *Casey*, 505 U.S. at 852. With these words, this Court recognized two central features of abortion restrictions. First, such restrictions may compel

women who wish to end their pregnancies to instead continue them and give birth, and thereby, to go through "sacrifice [and] suffering [that is] intimate and personal," at the State's behest. Second, such restrictions, when pressed upon unwilling women, inevitably enforce a State-mandated "vision of the woman's role," a vision in which motherhood effectively becomes a duty rather than a choice. As explained below, the ultimate impact of abortion restrictions that interfere with women's ability to control whether and when to have children is to impede women's equality.

A. Restricting Choice in Childbearing Requires Women to Endure the Physical Constraints and Risks of Pregnancy

When abortion restrictions require a woman to continue a pregnancy she would otherwise end, the physical impact is readily perceived: such restrictions "touch[] . . . upon the very bodily integrity of the pregnant woman." *Casey*, 505 U.S. at 896. They leave women who wish to but are prevented from ending their pregnancies vulnerable to physical constraints and risks, including the labor of childbirth, that they otherwise would avoid.[2]

This physical impact of restraints on women's choice in childbearing—the effect of continuing an unwanted pregnancy on mobility, its potential interference with work, including the care of existing children, and the possibility of serious medical complications—is

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[2] Pregnancy poses greater health risks than does abortion. *See* Stanley K. Henshaw, M.D., *Unintended Pregnancy and Abortion: A Public Health Perspective, in A Clinician's Guide to Medical and Surgical Abortion* 20 (Maureen Paul, M.D. ed., 1999) (noting risk of death due to complications from pregnancy or childbirth is ten times greater than risk of death from abortion).

temporary, yet, as this list suggests, it is far from trivial. Its constitutional significance is that the resulting intrusion on women's bodies is greater than bodily intrusions that, in other contexts, have been deemed beyond the State's power to compel. *See, e.g.*, *Winston v. Lee*, 470 U.S. 753, 761, 766 (1985) (holding that compelled surgery to retrieve bullet from criminal defendant was unconstitutional "intrusion upon the individual's dignitary interest in personal privacy and bodily integrity"); *Rochin v. California*, 342 U.S. 165, 174 (1952) (finding that forcible stomach pumping was "so brutal and so offensive to human dignity" as to violate due process). Moreover, when a statute, like the one at issue here, has no exception to protect the pregnant woman's or teen's health, it may require her to sacrifice her well-being in favor of potential life, a result contrary to the Constitution: "[t]he essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880.

From these perspectives, permitting the State a free hand with abortion restrictions would allow a degree of control over women's bodies that is nowhere countenanced for men, reinforcing women's inequality. As Justice Stevens wrote in his separate opinion in *Casey*, "'Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.' The same holds true for the power to control women's bodies." *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part) (citation omitted).[3]

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[3] Cases involving abortion often discuss the issue in terms of the woman's right to choose abortion or to terminate her pregnancy. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) ("right to choose abortion"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (referring to "woman's decision whether or not to terminate her pregnancy").

B. Restricting Choice in Childbearing Imposes a Stereotypical Role on Women

The *Casey* decision further recognized that when the State interferes with women's exercise of choice in childbearing, it does far more than simply expose women to physical consequences—it also distorts women's ability to shape their own lives.

One aspect of the damage that unbridled State authority in this realm would impose was expressed eloquently by the *Casey* Court when it recognized that a zone of privacy around the pregnant woman's decision whether to continue or end her pregnancy is necessary to preserve her ability to "define [her] own concept of existence, of meaning, of the universe, and of the mystery of human life" free from the "compulsion of the State." *Casey*, 505 U.S. at 851. Eleven years later, this Court acknowledged that *Casey* and the privacy decisions that preceded it protect even more than personal decisions over childbearing; they also protect the expression of

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However, it is revealing for an equality-focused analysis also to consider these cases from another angle, as deciding the circumstances under which government may compel a pregnant woman to continue her pregnancy and give birth. *See, e.g., Casey*, 505 U.S. at 928 ("State restrictions on abortion compel women to continue pregnancies they otherwise might terminate.") (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 350 (1992) ("A pregnant woman seeking an abortion has the practical capacity to terminate a pregnancy, which she would exercise but for the community's decision to prevent or deter her. If the community successfully effectuates its will, it is the state, and not nature, which is responsible for causing her to continue the pregnancy.").

personal autonomy and meaning through intimate, sexual relationships. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

Yet *Casey*, by referring to the State's imposition of its "vision of the woman's role," 505 U.S. at 852, also points out that restrictions on reproductive choice go beyond allowing the State to *interfere* with the female's capacity to direct her life; they allow the State to *choose* the direction for her, and the path that the State chooses is motherhood. Justice Blackmun pinpointed precisely this concern in his separate opinion in *Casey*:

> A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. . . . By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State . . . assumes that [women] owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.

Id. at 928.

This role-enforcing aspect of abortion restrictions places them squarely within this Court's equality-based concern with government enforcement of sex role stereotypes. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (finding that reliance on gender stereotypes impermissibly "ratif[ies] and reinforce[s] prejudicial views of the relative abilities of men and

women"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725-26 (1982) (disapproving policy reflecting "archaic and stereotypic notions" of the "proper roles of men and women"). *See also UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) ("It is no more appropriate for the Courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."). *See generally* David H. Gans, *Note: Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 Yale L.J. 1875, 1876-81 (1995) (discussing the role of stereotypes in the Court's gender equality jurisprudence).

C. Restricting Choice in Childbearing Impedes Women's Equal Participation in Civic Life

A more public, equality-focused dimension of women's right to choose appears in the *Casey* decision, as well: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856. With recognition of their authority to decide for themselves whether to continue or end a pregnancy, women are more able to "ma[k]e choices that define their views of themselves and their places in society." *Id. See also id.* at 912 ("*Roe* is an integral part of a correct understanding of . . . the basic equality of men and women.") (Stevens, J., concurring in part and dissenting in part). Similarly, in *Lawrence*, this Court recognized that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." *Lawrence*, 539 U.S. at 575.

Abortion restrictions that impede women's choice in childbearing particularly affect women's equality because the role such restrictions may impose on an unwilling woman, that of motherhood, can heavily burden the woman's ability to "define [her] place[] in society." *Casey*, 505 U.S. at 856. This is true in part because, "[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them." *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) (citation omitted). In *Doe*, the court pointed to "some outrageous examples of this": *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (exempting women from jury duty because they are "regarded as the center of home and family life"); *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (restricting work hours of women, but not men, on basis of women's role in childbearing and dependence on men); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring) (prohibiting women from the practice of law based on women's "paramount destiny and mission" as wives and mothers).

This Court correctly recognized in *Casey* that the premise of these now-rejected cases, that women's "'special responsibilities' . . . preclude[] full and independent legal status under the Constitution," *Casey*, 505 U.S. at 897 (citation omitted), is "no longer consistent with our understanding of the family, the individual, or the Constitution," *id.* It nonetheless remains true, however, that the actual responsibilities of motherhood, particularly if forced upon a woman, may dramatically redirect her participation in society. Thus, only a dozen years after *Roe v. Wade*, then-Judge Ginsburg offered this observation concerning abortion restrictions: "Also in the balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal

citizen." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 383 (1985). Another observer elaborated on this point:

> When the state prohibits abortion, all women of childbearing age know that pregnancy may violently alter their lives at any time. This pervasively affects the ability of women to plan their lives, to sustain relationships with other people, and to contribute through wage work and public life. The right to equal citizenship encompasses the right "to take responsibility for choosing one's own future."

Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1017 (1984) (citation omitted); *see also* Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 Wake Forest L. Rev. 513, 532 (2003) (women's control over "their own sexuality and maternity" is "plainly indispensable, if women are to take their place as equal citizens in the public life of the community").

While the lasting impact of bearing a child could be mitigated by surrendering the child for others to raise, in reality, fewer than one percent of children born to never-married women are placed for adoption. National Adoption Information Clearinghouse, U.S. Administration for Children & Families, *Voluntary Relinquishment for Adoption, Numbers and Trends* (2005) (*available at* http://naic.acf.hhs.gov/pubs/s_place.cfm). This likely reflects the psychological toll of giving up a child at birth, which may be significant. *See* Holli Ann Askren & Kathaleen C. Bloom, *Postadoptive Reactions of the Relinquishing Mother: A Review*, 28 J. Obst. Gyn. & Neonatal Nursing 395, 397 (1999) ("Relinquishing

mothers have more grief symptoms than women who have lost a child to death, including more denial; despair; atypical responses; and disturbances in sleep, appetite, and vigor. . . . Lack of social acceptance of the grief response in relinquishing mothers also contributes to chronic, pathologic grief."). Thus, overbroad interference with the ability to obtain an abortion is likely to result in women not only giving birth, but also having lifelong responsibility for children they did not intend to bear.

Moreover, intense social forces operate on women once they have children. These emphatically are not inevitable or biological; nonetheless, they are very real and must be taken into account in considering the impact of abortion regulation on women's equality.

One such force was recently discussed by this Court: the "'pervasive presumption that women are mothers first, and workers second. . . . has in turn justified discrimination against women when they are mothers or mothers-to-be.'" *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (citation omitted). "[P]arallel stereotypes presuming a lack of domestic responsibilities for men . . . . created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees." *Id.* Without question, there has been substantial progress away from such stereotypes, and a long-term effort is underway to achieve a more equitable distribution of the irreplaceable work of raising children. Yet contemporary evidence continues to demonstrate the deep and sustained impact that motherhood may have on women's participation in work and public life.

Teenagers have the most to lose when abortion restrictions push them into unwanted, premature

childbearing. Teen childbearing has "major adverse socio-economic consequences," including substantial reductions in wages by age 25. Daniel Klepinger *et al.*, *How Does Adolescent Fertility Affect the Human Capital and Wages of Young Women?*, 24 J. Hum. Resources, 421, 443 (1999). Teenage mothers are also far less likely than women who first give birth later on to attend college. Sandra L. Hofferth *et al.*, *The Effects of Early Childbearing on Schooling Over Time*, 33 Fam. Plan. Persp. 259, 266 (2001).

Motherhood that is not freely chosen—whether begun in the teen years or later—may impose significant and unwanted limitations on older women, as well. Two-thirds of mothers aged 25-44 work less than full-time year-round, so that "[i]n an age where virtually all good jobs require full-time work, and many of the best jobs require overtime, mothers are cut out of the labor pool for many desirable jobs, blue- as well as white-collar." Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. Gender Race & Justice 411, 415-16 (2002). Economists have identified a "wage penalty" for motherhood of approximately 7 percent per child. Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 Am. Soc. Rev. 204, 219 (2001). And mothers, whether married or single, continue to carry the primary workload of child rearing and housekeeping. Anne L. Alstott, *No Exit: What Parents Owe Children and What Society Owes Parents* 27-30 (2004).

These statistics, of course, show only part of the picture, because many, if not most, women find deep satisfaction in bearing and raising children and experience motherhood as a uniquely valuable endeavor. Yet no matter how widespread the acceptance of a traditional role, it is still well beyond government's power to compel

adhesion to it. *See United States v. Virginia*, 518 U.S. 515, 550 (1996) (holding that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify" government action limiting opportunities for women to act outside their traditional roles). Moreover where, as here, the traditional role has so long been used to limit a whole class's participation in public life, the impact on equality must be of special concern.[4]

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[4] The role-reinforcing aspect of restrictions on the right to choose abortion is underscored by examining the history of such restrictions in the United States. Abortion was permitted under common law until the stage of pregnancy known as quickening, when the pregnant woman reported that she detected fetal movement. *See Roe*, 410 U.S. at 132. Scholars have detailed how the nineteenth century campaign to ban abortion throughout pregnancy was intended in part to enforce strict views of women's permissible roles. *See, e.g.*, Siegel, *supra* n.3, at 293-304 (1992). The doctors who led the campaign argued that by aborting a pregnancy, a woman "'becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract.'" *Id.* at 295 (quoting D.A. O'Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 Transactions Am. Med. Ass'n 239, 241 (1871)). Giving birth was not only a duty the woman owed her husband, it was also "'a duty [she] tacitly promised to the State.'" *Id.* at 297 (quoting D.H., *On Producing Abortion: A Physician's Reply to the Solicitations of a Married Woman to Produce a Miscarriage for Her*, 17 Nashville J. Med. & Surgery 200, 201 (1876)). At times, proponents of banning abortion stated outright their distress about women's rising aspirations toward equal participation in society:

> "Woman's rights" now are understood to be, that she should be a man, and that her physical organism, which is constituted by Nature to bear and rear offspring, should be left in abeyance, and that her ministrations in the formation of character as mother should be abandoned for the sterner rights of voting and law making.
>
> The whole county is in an abnormal state, and the tendency to force women into men's places, creates new ideas of women's duties, and therefore . . . the marriage state is frequently childless.

Viewed from an equality perspective, State-imposed limits on women's reproductive choice may work to undermine their claim to equal citizenship in a manner that bears a resemblance to the operation of the Colorado constitutional provision that was invalidated in *Romer v. Evans*, 517 U.S. 620 (1996). This Court held that the Colorado provision, which barred lesbians and gay men in the state from obtaining legal protection against discrimination, impermissibly "disqualif[ied] . . . a class of persons from the right to seek specific protection from the law." *Id.* at 633. Restrictions on women's ability to exercise choice over childbearing clearly do not bar women from advocating for themselves, yet, by treating women's right to a basic means of asserting control over their lives as a constantly unsettled and open question, the ongoing enactment of such restrictions actually diminishes women's ability to advocate for their needs. Faced with the necessity of continually fending off threats to their reproductive freedom, women are far less able to pursue a positive agenda on issues like improving the availability of quality, affordable child care and increasing women's access to high-paying jobs. *Cf.* Frances Olsen, *The Supreme Court, 1988 Term—Comment: Unraveling Compromise*, 103 Harv. L. Rev. 105, 124 (1989) ("[t]he abortion debate keeps women off-balance and less able to struggle against the unreasonable conditions that make unwanted pregnancy so common an occurrence").

Moreover, when government imposes its will on women by denying them control over their reproductive lives, it, like the State of Colorado under the discriminatory amendment, "put[s] [women] in a solitary

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Id. at 303-04 (quoting Montrose A. Pallen, *Foeticide, or Criminal Abortion*, 3 Med. Archives 193, 205-06 (1869)).

class with respect to transactions and relations in both the private and governmental spheres," *Romer*, 517 U.S. at 627. Women are made subject to having their private volition swept away by the government in the event of an unintended pregnancy, while men face no parallel threat to their "autonomous charge of [their] full life's course." *See* Ginsburg, *supra*, at 383. Such differential treatment itself casts doubt on women's entitlement to full equality.

II. ANALYZING ABORTION RESTRICTIONS ACCORDING TO OVERBREADTH DOCTRINE RATHER THAN THE SALERNO STANDARD IS NECESSARY TO PROTECT WOMEN'S EQUALITY AS WELL AS THEIR PRIVACY

This Court's repeated application of overbreadth doctrine to uphold facial challenges to abortion restrictions is fully justified by the values that doctrine serves. Thus, while the applicability of overbreadth analysis to abortion restrictions was conclusively resolved by its use in *Casey* and *Stenberg v. Carhart*, 530 U.S. 914 (2000), should this Court revisit the issue the conclusion must be the same. This is true for at least two reasons. First, the same concern that overbroad restrictions of speech will chill the legitimate exercise of constitutional rights applies to overbroad restrictions on abortion. Second, just as free speech promotes both the individual's interest in speaking and the society's interest in democracy, so does freedom from state interference in the decision whether to bear a child promote both the individual's interest in privacy and the society's interest in equality. The alternative standard contended for here, articulated in *United States v. Salerno*, 481 U.S. 739, 745 (1987), would, by contrast, deny a facial challenge to a statute restricting abortion no matter how profoundly it chilled women's right to reproductive choice, so long as a single abortion came within the statute's lawful reach.

Under *Salerno*, women could vindicate their right to choose only through as-applied challenges, however, doing so would fall far short of adequately protecting women's constitutional rights. Applying the *Salerno* standard would thus inhibit countless women from exercising their right to choose whether to continue or end their pregnancies, deeply undermining women's equality. For these reasons, this Court should reject the State's call, joined by the Solicitor General and others, to apply the *Salerno* standard when assessing facial challenges to restrictions on abortion, and instead should adhere to the overbreadth approach that has properly guided the analysis of such restrictions from *Roe* to *Casey* to *Carhart*.

A. Overbreadth Analysis is Necessary to Avoid Chilling the Exercise of the Right to Choose Abortion

Overbroad restrictions on abortion pose the same threat of chilling individuals from engaging in constitutionally protected conduct that this Court has recognized in allowing facial challenges to statutes that threaten to inhibit freedom of speech. *See, e.g.*, *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (explaining that overbreadth challenge permitted because "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech"); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"). Thus, contrary to Petitioner's contention that overbreadth doctrine applies only in the context of the First Amendment, this Court repeatedly has struck down overbroad abortion restrictions based on their chilling effect. *See, e.g.*,

Thornburgh v. American Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 767-68, 771 (1986); *Colautti v. Franklin*, 439 U.S. 379, 396 (1979). Moreover, just last year, this Court acknowledged that "weighty" reasons support the "validity of facial attacks alleging overbreadth" in suits challenging abortion restrictions, as well as in limited other contexts. *Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (citing *Stenberg v. Carhart* as application of overbreadth doctrine in abortion case).

In these limited contexts, overbreadth analysis addresses the chilling effect that arises when a statute that is constitutional in its impact on some is likely to work an unconstitutional restraint on others. The invalidation in *Casey* of a provision that required a married woman seeking an abortion to certify that she had notified her husband of her plans provides a good example of this Court's recognition of the chilling effect of an overbroad restriction on abortion.[5] The Court invalidated this notification provision because it found that women threatened by their husbands' physical or psychological abuse—women who, under the Constitution, had a right to decide to obtain an abortion—were "likely to be deterred from procuring an abortion" by the husband notification requirement. *Id.* at 894. The Court reached this conclusion notwithstanding that most married women tell their husbands before obtaining an abortion, *id.* (noting that 95 percent of women notify their husbands of planned abortion), and that the statute allowed a woman alternatively to certify that she believed notifying her husband of her abortion would result in bodily injury to

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[5] The undue burden standard articulated in *Casey* is widely recognized as a form of overbreadth review. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 276 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1355-56 (2000).

her, *id.* Thus, while the statute did not work an unconstitutional interference with the right to abortion for most women, allowing it to stay in force would have chilled some women's exercise of that right, and therefore facial invalidation was appropriate.

The *Salerno* standard, on the other hand, provides no such protection against chilling the citizenry's exercise of constitutional rights. Applied to the husband-notification provision at issue in *Casey*, a court would find that plaintiffs had failed to meet their burden of establishing "that no set of circumstances exists under which the Act would be valid," as *Salerno* requires, 481 U.S. at 745, because the statute would not create an undue burden on those women who would notify their husbands of a planned abortion whether compelled by statute to do so or not. *Salerno* would, of course, permit an abused woman to bring an as-applied challenge, but even that would not cure the chill on constitutional rights. Requiring each pregnant woman with an abusive husband to go into court to seek personal vindication of her right to make the abortion decision would be impracticable for many reasons, including the unlikelihood that such women would come forward. Even if a court granted as-applied relief for a group of women, essentially rewriting the provision to exempt all women with abusive husbands, the impact of such a ruling would be limited. Some abused women would fear asserting that they qualified for the court-created exemption, *cf. Casey*, 505 U.S. at 893 (noting abused women's fears of reporting abuse); others would be too ashamed to claim it; and in some cases, doctors would not know which women qualified for it. Facial invalidation of the overbroad restriction on the basis of its chilling effect was the only way to secure the constitutional rights of these women against legislative encroachment.

In fact, further analysis demonstrates that adopting the *Salerno* standard for facial challenges to abortion restrictions would make widespread chilling of the right to decide when and whether to have children the norm rather than the exception. The implications of applying *Salerno* t[o] abortion restrictions are clearly demonstrated by the dissent filed to the denial of *certiorari* in *Ada v. Guam Society of Obstetricians and Gynecologists*, 113 S. Ct. 633 (1992) (Scalia, J., dissenting). That case involved a seemingly unremarkable holding that a territorial statute was unconstitutional under *Roe v. Wade* because it prohibited any abortion unless two physicians agreed that continuing the pregnancy would endanger the woman's life or gravely impair her health. *Guam Society of Obstetricians and Gynecologists v. Ada*, 1992 U.S. App. LEXIS 13490, at *1, *22-*23 (9th Cir. 1992). A facial challenge was successful in the district court and upheld by the Ninth Circuit, *id.*, and this Court denied the Territory's petition for *certiorari*, *Guam Society*, 506 U.S. 1011 (1992). Three Justices dissented, however, arguing that the *Salerno* standard, not overbreadth, supplied the appropriate rule of decision. *Guam Society*, 113 S. Ct. at 634. The Guam statute would pass *Salerno*'s test for a facial challenge, they contended, because it appeared to have at least one constitutional application—to post-viability abortion. *Id.* *Salerno*, then, would have prohibited a court from adequately remedying this patently unconstitutional restriction on women's right to choose abortion on a facial challenge. Instead, only as-applied challenges could be brought, and most likely, a series of such challenges would have been required simply to conform the statute to the Constitution's clear requirements.

The chill that applying *Salerno* to facial challenges would exert on women's rights is demonstrated by considering just a few of the potential outcomes had the

dissent in *Guam Society* carried the day. A court might have ruled the Guam statute unconstitutional as applied in a challenge brought by a woman in the first trimester of pregnancy, while explicitly leaving open the question of a second trimester abortion. An as-applied challenge brought by a woman who needed an abortion for medical reasons but had only one doctor's advice on the matter might succeed without any ruling as to the statute's application to women whose reasons for seeking abortions were not related to health. In each of these cases, the exercise of the right to choose by women whose circumstances did not match those of the litigants would be unconstitutionally chilled unless and until a challenge that fit their circumstances was litigated.

Discarding overbreadth review in favor of the *Salerno* standard would substantially chill the exercise of reproductive rights even in the case of a less sweeping statute, as a hypothetical example demonstrates. Suppose that South Dakota enacted a law requiring any woman seeking an abortion in that state to make three trips to the abortion provider, each separated by twenty-four hours: the first, for an in-person counseling session about pregnancy alternatives; the second, to consult with a psychologist; and the third, for the abortion procedure itself. Under *Casey*'s overbreadth standard, a facial challenge could be brought based on the impact of this law on women seeking abortions in South Dakota. Given that South Dakota has just one abortion provider,[6] the evidence might convince a court that this mandate would actually *prevent* a significant percentage of women from obtaining an abortion: for example, those who had to travel the farthest; those for whom the obstacles of

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[6] *See Planned Parenthood v. Rounds*, 372 F.3d 969, 972-73 (8th Cir. 2004) (concluding that there is only one abortion provider in South Dakota, located in Sioux Falls).

arranging for child care, losing work income, and paying for multiple trips would be insurmountable; and those teens who would need to pursue a judicial bypass in addition to making three confidential trips to the abortion provider.[7] *Cf. Casey*, 505 U.S. at 886 (noting trial court's findings that 24-hour waiting period was "particularly burdensome" for "those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others"). Based on this showing of undue burden, the court could strike down the statute as a whole.

If *Salerno* provided the standard, however, the facial challenge would fail, and women would have to seek as-applied relief. Such relief would inevitably be inadequate: some women would not go to court and would be unable to exercise their right, and those who did go to court would achieve only piecemeal relief. A teenager who was burdened by the requirement might obtain judicial relief that would apply to other young women needing judicial bypasses, but adult women burdened by the law would remain unsure of their right to obtain an abortion. A successful as-applied challenge brought by a woman who showed that the distances involved created a substantial burden for her would not remove the chill for those women who lived closer but faced a substantial burden due to the expenses associated with complying with the law. Moreover, it is unclear how the court could craft appropriate relief. For an as-applied challenge on behalf of women unable to obtain abortions under the law due to geography, would relief be granted just for women living the same distance from the abortion provider as the

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[7] South Dakota requires notification of one parent before a minor obtains an abortion and provides a judicial bypass procedure. S.D. Codified Laws § 34-23A-1 *et seq.* (2005).

woman mounting the challenge? Similarly, would relief for a woman based on the undue financial strain created by the three-trip requirement be limited to women at or below the same income level, so that women with higher incomes who nonetheless were unable to comply with the requirement would need to bring their own challenge? Short of facial invalidation, a ruling in any one case cannot answer such questions. Each as-applied holding would leave in place the chill on the rights of those women who were unconstitutionally burdened by the statute, but whose burden varied enough to put them outside the clear terms of any one holding.

B. Applying the *Salerno* Standard Would Threaten Women's Equality

Robust overbreadth protection against unconstitutional incursions on women's right of choice in childbearing protects a second value, as well: women's equality. This protective function is parallel to the role that robust overbreadth protection for speech plays in the functioning of our democracy. As with freedom of speech, the right to end an unwanted pregnancy "contributes vitally to the preservation of an open, democratic political regime, at the same time as it secures rights of high importance to particular individuals." *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 264 (1994). The *Salerno* alternative, by contrast, would have a devastating impact on reproductive freedom and women's equality, and for that reason, too, it must be rejected.

Depriving women of choice concerning childbearing severely curtails their ability to participate in our "open, democratic political regime," both by waylaying their efforts to fulfill roles of their own choosing, and by imposing significant burdens on them. (*See supra* Point I).

Just as freedom of speech protects "'[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people,'" *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)), so does reproductive freedom protect the opportunity of women to participate on their own terms in public life. Laws that strike directly at the ability of half the population to fully participate in our democracy threaten its vitality as surely as do laws that infringe speech. Thus, applying overbreadth analysis to void unduly burdensome abortion restrictions goes beyond "protect[ing] personal moral decisions," Dorf, *supra*, at 269. Protection against deprivation of reproductive choice promotes equality among the citizenry, an "affirmative good" of the highest constitutional order. *See id.* at 269-70 (recognizing that overbreadth analysis promotes "affirmative good" of free speech).

Adopting the *Salerno* standard to evaluate abortion restrictions would, by contrast, foment insecurity by unleashing a flood of unconstitutional restrictions on abortion and docket-clogging as-applied challenges. As matters stand, states can, and most states do, bar abortion after viability. These bans are constitutionally permitted so long as they provide exceptions for abortions needed to protect the woman's life or health. *Roe*, 410 U.S. at 164-65. Against this background, virtually any abortion regulation could be crafted to have some valid application—and therefore to withstand a facial challenge under the *Salerno* standard—so long as its reach included post-viability abortions not needed to preserve life or health. Thus, as the *Guam Society* dissent indicates, the *Salerno* standard would make it virtually impossible to mount a successful facial challenge to an abortion restriction. Indeed, even with the availability of facial challenges and clear guidance from this Court as to the

permissible scope of abortion restrictions, over the last ten years, more than four hundred such restrictions have been enacted. If legislators were given free rein to demonstrate their antipathy to abortion with any legislation, so long as its coverage included post-viability abortions, there would be no limit to their ingenuity. In this circumstance, "when a constitutional provision both affords protection to . . . conduct that is especially prone to 'chill' and reflects a value that legislatures may be unusually disposed to undervalue," overbreadth analysis serves as a much-needed "judicially established disincentive" to unconstitutional legislation. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1352 (2000).

Thus, applying the *Salerno* standard to facial challenges to abortion restrictions would keep women in a constant state of uncertainty over the parameters of the right to choose, with all the harmful consequences for their liberty and equality interests that flow from such uncertainty. *Cf. Casey*, 505 U.S. at 844 ("Liberty finds no refuge in a jurisprudence of doubt."); *id.* at 856 (recognizing that individuals organize their relationships and their lives mindful of the availability of abortion if needed). Women would be thrown back almost to the pre-*Roe* days, when, at best, states allowed them to plead with doctors or hospital committees for permission to obtain an abortion, *cf. Doe v. Bolton*, 410 U.S. 179, 195-98 (1973) (discussing hospital abortion committee process), except that their pleas would now be in a judicial forum. To force women into case-by-case adjudication of infringements on the right to choose abortion would do inestimable damage to them as individuals and as a class.

The damage that applying the *Salerno* standard to abortion restrictions would do to women's constitutional rights would be magnified many times over by a practical

impediment particular to as-applied challenges brought by pregnant women. That impediment is the inevitable time constraint: the short duration of pregnancy, and the even shorter period during which a pregnancy may be lawfully terminated, often does not permit a pregnant woman sufficient time to mount an as-applied constitutional challenge to an abortion restriction. A teenager is even less likely to mount a timely challenge, as teens tend to seek abortion later than older women. Centers for Disease Control and Prevention, *Abortion Surveillance—United States, 2001*, in *Surveillance Summaries*, 53 Morbidity & Mortality Wkly. Rep. (No. SS-9) tbl. 16 (Nov. 26, 2004). Thus, a pregnant woman "may not obtain a declaratory judgment on [the statute's] invalidity as applied to her in time to exercise her right. Also, she may not wish to pursue what she sees as an uncertain and expensive legal remedy, especially if she lacks legal sophistication or financial resources. Instead, she may . . . engage in self-help, or simply carry the unwanted pregnancy to term." Dorf, *supra*, at 270-71. For these reasons, as well as those discussed above (*see supra* Point II(A)), the protection that as-applied challenges provide against government interference with a woman's right to choose abortion is illusory.

In sum, applying the *Salerno* standard to abortion restrictions would invite chaos in a fundamental realm of women's lives. The harm it would engender would go well beyond requiring women to troop to courthouse after courthouse in state after state to secure what this Court has repeatedly declared is already theirs under the Constitution: the right to decide, for themselves, when and whether to have children. For while it is conceivable that blatantly unconstitutional restrictions on abortion could eventually be narrowed to their constitutional boundaries through case-by-case adjudication, this would happen only if women and their doctors continued to

come forward to challenge the laws; if they continued to find lawyers willing and able to represent them; if they continued to find judges on the bench with the courage to uphold their constitutional rights in a hostile environment; and if narrowing constructions could be clearly crafted and made known to all women. But even if the necessary narrowing eventually came to pass, meanwhile, such statutes would be spreading their chill, taking their toll on the lives of tens or hundreds of thousands, or even millions of women, depriving them of the "ability to control their reproductive lives" that facilitates their "ability . . . to participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856. Adopting *Salerno* as the standard that governs restrictions on abortion would make a mockery of the constitutional rights of women and of their aspirations to equal treatment under the law.

CONCLUSION

For the reasons herein, and those set forth by Respondents, *amici curiae* urge this Court to uphold the decision below.

October 12, 2005

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NAMES AND INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

CALIFORNIA WOMEN'S LAW CENTER

The California Women's Law Center (CWLC) works to ensure, through systemic change, that life opportunities for women and girls are free from unjust social, economic and political constraints. CWLC, established in 1989, works in the following priority areas: sex discrimination in education and employment, women's health and reproductive rights, violence against women, women's economic security, race and gender, and exploitation of women. Since its inception, CWLC has worked to ensure that women have full and complete access to all reproductive health services including abortion.

CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies was founded in 1972 with a mission to shape public policy to improve women's lives. A hallmark of our work is the multiethnic feminist lens through which we view all issues affecting women and girls. In all of our work, we look at the combined impact of gender, race, ethnicity, class, age, disability, and sexual orientation. We struggle for women's human rights – justice and equality for women at home and abroad. The Center represents the interests of young women whose ability to control their reproductive lives will be detrimentally impaired by abortion restrictions such as those imposed by the New Hampshire Parental Notification Prior to Abortion Act.

COALITION OF LABOR UNION WOMEN

Coalition of Labor Union Women (CLUW) is an AFL-CIO affiliated non-profit membership organization that

focuses on issues of primary concern to working women, including equal pay, child and elder care benefits, job security, affordable health and child care, reproductive rights, protection from sexual harassment and violence at work and affirmative action. Founded in 1974, CLUW has over 20,000 members and 75 chapters across the United States. The CLUW Center for Education and Research has been actively involved in training and educational activities designed to inform women about reproductive choices and related health care issues. CLUW's educational and advocacy efforts have led to collective bargaining proposals and policies protecting women's reproductive rights.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Communications Workers of America, AFL-CIO (CWA) is an international labor union representing more than 700,000 workers in media and information technology, telecommunications, printing and publishing, health care, higher education, airlines and manufacturing industries. A significant portion of CWA members are women. CWA has long advocated for gender equality in working conditions and benefits for its represented workers and for legal and contractual protections that ensure equal treatment for working women in all aspects of society.

CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND

Connecticut Women's Education and Legal Fund (CWEALF) is a statewide non-profit organization dedicated to empowering women, girls, and their families to achieve equal opportunities in their professional and personal lives. CWEALF joined this brief because it believes that the freedom to make their own choices

without anyone else's consent, including the choice to terminate a pregnancy, is essential to women's equality.

FEMINIST MAJORITY FOUNDATION

Founded in 1987, the Feminist Majority Foundation (FMF) is the largest feminist research and action non-profit organization dedicated to women's equality and reproductive health in the country. Our programs focus on advancing the legal, social and political equality of women, securing reproductive freedom and access for all women, and recruiting and empowering young women leaders. The Feminist Majority Foundation's reproductive rights projects involve public education; media outreach and advocacy work; research and public policy; community and grassroots organizing; and leadership training. FMF supports and actively pursues legal protection for reproductive health services and women's access to reproductive health care. In 1994, FMF provided legal counsel in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

LEGAL MOMENTUM

Legal Momentum (the new name of NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum views reproductive rights as central to women's equality. To this end, Legal Momentum has litigated numerous cases involving reproductive health services, including *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

MS. FOUNDATION FOR WOMEN

The Ms. Foundation for Women is the first and leading national women's philanthropy, and is dedicated to lifting women's and girls' voices and promoting their power to

create a more equitable society. The Ms. Foundation has long recognized that the extent to which women can control their reproductive capacities is a principal factor in determining the quality and character of their lives; this is especially true for low-income women, young women, and women of color, who are often the first victims of anti-choice legislation. The Ms. Foundation for Women has been responding to attacks on reproductive freedom with a combination of grant-making, technical assistance, and advocacy for more than 30 years.

NATIONAL CENTER FOR LESBIAN RIGHTS

The National Center for Lesbian Rights (NCLR) is a national legal resource center with a primary commitment to advancing the rights and safety of lesbians and their families through a program of litigation, public policy advocacy, and public education. Since its inception in 1977, NCLR has had a particular interest in defending reproductive freedom for all women, regardless of sexual orientation.

NATIONAL ORGANIZATION FOR WOMEN

The National Organization for Women (NOW) is the nation's oldest and largest women's rights advocacy organization, with more than 500,000 contributing members in 450 chapters in all 50 states and the District of Columbia. A major goal of NOW for more than 35 years has been to ensure reproductive freedom for women, including safe, legal, and accessible abortion and birth control.

NATIONAL WOMEN'S POLITICAL CAUCUS

The National Women's Political Caucus (NWPC) is a national, multipartisan, grassroots membership organization dedicated to supporting pro-choice women candidates for elected and appointed office. All

candidates who receive NWPC's endorsement believe that a woman's reproductive health should remain unfettered by parental notification requirements and abortion procedure bans.

NORTHWEST WOMEN'S LAW CENTER

The Northwest Women's Law Center (NWLC) is a nonprofit public interest organization that works to advance the legal rights of all women through litigation, education, legislation, and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and expanding women's reproductive rights and has long focused on the threats to young women's access to abortion and other reproductive healthcare.

PEOPLE FOR THE AMERICAN WAY FOUNDATION

People For the American Way Foundation (People For) is a national, non-partisan education-oriented citizens organization established to promote fundamental constitutional rights and civil liberties. Founded in 1980 by religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For has over 750,000 members, supporters and activists across the country. People For has previously joined *amicus* briefs before this Court in cases raising important questions relating to women's constitutional right to privacy and access to reproductive health services, including abortion.

SOUTHWEST WOMEN'S LAW CENTER

The Southwest Women's Law Center is a nonprofit public interest organization based in Albuquerque, New Mexico. Its mission is to advance the health, safety, social, educational, and economic interests and needs of women

and girls. The Southwest Women's Law Center seeks to promote access to comprehensive reproductive health care information and services and to eliminate discrimination and disparities in access to such services and information based on gender.

THIRD WAVE FOUNDATION

Founded in 1996, the Third Wave Foundation is the first national, feminist foundation focused on supporting the vision and voices of young women ages 15 to 30. Our purpose is to support and strengthen young women and their allies working for gender, racial, social, and economic justice. We do this through financial resources, public education, and relationship building opportunities. Third Wave is dedicated to supporting a young woman's access to reproductive health services through much needed monetary support. Third Wave joined this brief because it strives to ensure that women and girls have the resources and power to make healthy decisions about their bodies, sexuality, and reproduction for themselves and their communities.

WOMENS WAY

WOMENS WAY is the nation's oldest and largest women's funding federation. Since its inception in 1976, WOMENS WAY has recognized that the extent to which women can control their reproductive health is a critical factor in determining the quality and impact of their lives. As attacks on reproductive choice escalate in our clinics and statehouses, WOMENS WAY continues to defend reproductive freedom by raising funds and mobilizing community resources to enhance and improve the lives of hundreds of thousands of Delaware Valley, Pennsylvania women and families each year.

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In The
Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF MINNESOTA GOVERNOR TIM PAWLENTY AND NORTH DAKOTA GOVERNOR JOHN HOEVEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CASES

Hodgson v. Minnesota, 497 U.S. 417 (1990) 8, 9, 10

STATUTES

Minn. Stat. §144.343(4)(a) (2004) 1

N.D. Cent. Code §14-02.1-03.1 1

MISCELLANEOUS

Alan Guttmacher Institute. *U.S. Teenage Pregnancy Statistics: Overall Trends by Race and Ethnicity and State by State Information*. New York: Alan Guttmacher Institute, 2004; http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf. 7, 8

American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy – Current Trends and Issues: 1998*, 103 Pediatrics 516 (1999) 6

Terry Bohn, ed., *Maternal and Child Health Status* (2002) available at http://www.ndmch.com/publications/MCHHealthStatusStatistics2002.pdf 7

HP Boyer and D. Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment*, Fam. Plan. Perspectives at 4 (1992) 6

Center for Disease Control, *Teen Pregnancy and Birth Rates – United States, 1990*, 42 Morbidity and Mortality Weekly 733, 735 (Figure 1) (Oct. 1, 1993) 7

TABLE OF AUTHORITIES – Continued

Page

Center for Health Statistics, Minnesota Department of Health, *Pregnancy Outcomes and Pregnancy Rates by Age of Women, Minnesota Residents*, 1988-1988, 1990 ..... 8, 9

Child Trends, *Facts at a Glance 2005* available at http://www.childtrends.org/files/Facts_2005.pdf 5

Richard A. Crosby *et al.*, *Low Parental Monitoring Predicts Subsequent Pregnancy Among African-American Adolescent Females*, 1 Pediatric & Adol. Gynec. 43 (2002) 4

Ralph J. Diclemente, *et al.*, *Parental Monitoring: Association with Adolescents' Risk Behaviors*, Pediatrics 1363 (June 2001) 5

M. Joycelyn Elders and Alex E. Albert, *Adolescent Pregnancy and Sexual Abuse*, 280 JAMA 648 (1998) 6

Charlotte Ellertson, *Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana*, 87 Amer. J. Pub. Health 1367 (1987) 9

HP Gershenson, *et al.*, *The Prevalence of Coercive Experience Among Teenage Mothers*, J. INTERPERS. VIOL. 204 (1989) 6

Hubert H. Humphrey, III, Attorney General of the State of Minnesota, *Background Briefing Concerning the Minnesota Parental Notification Law* 9

Phillip B. Levine, *Parental Involvement Laws and Fertility Behavior*, 22 J. Health Econ. 861 (Sept. 2003) 9

Mike A. Males, *Adult Involvement in Teenage Childbearing and STD*, Lancet 64 (July 8, 1995) 6

TABLE OF AUTHORITIES – Continued

Page

Minn. Dept. of Health, HEALTHY MINNESOTANS: STRATEGIES FOR PUBLIC HEALTH VOL. 2 (2002) 2, 3

J.L. Rogers, et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 Amer. J. Pub. Health 294 (1991) 9

Mary B. Short & Susan L. Rosenthal, *Helping Teenaged Girls Make Wise Sexual Decisions*, 48 Contemp. OB/GYN 84 (2003) 3

Lisa Turnham, *2005 Minnesota State Adolescent Sexual Health Report* available at http://www.moappp.org/Documents/2005AdoHealthReport.pdf 3

STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Governors of Minnesota and North Dakota.

North Dakota and Minnesota currently have the nation's first and fourth lowest pregnancy rate among minors, respectively. In recent decades, Minnesota has reduced the rate of pregnancies among girls aged 15 to 17 by nearly 50 percent. This decline is due in part to the state's parental notification law, which is similar to the New Hampshire statute in the case at bar.

North Dakota law requires the consent of the minor and both parents prior to the performance of an abortion. N.D. Cent. Code §14-02.1-03.1. The only two exceptions are cases involving judicial bypass, and emergencies where the abortion is necessary to preserve the minor's life. *Id.* There is no exception to preserve the health of the minor. This law has been in effect since 1981.

The Minnesota law provides for a physician to forego notification in cases in which "the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice." Minn. Stat. §144.34, subd. 3(4)(a). There is no comparable exception to prevent harm to a minor's health in the Minnesota law.

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[1] No counsel for any party authored any portion of this brief. No persons other than *amici curiae*, or his counsel have made a monetary contribution to the preparation and submission of this brief.

In the almost twenty years that Minnesota has required some form of parental notification, with no express exception for health-related emergency, there have been no reports of adolescent maternal mortality or morbidity due to delays for parental notice.

The resolution of the present case will affect the constitutionality of the Minnesota and North Dakota statutes – and could potentially undermine the ability of parents in these states to protect young woman against predation by older men.

Amici curiae believes that their perspective will complement the brief of the Petitioner and assist the Court in the resolution of the issues presented by this case.

SUMMARY OF ARGUMENT

A growing body of scientific literature evidences the benefits of parental contact and authority throughout a child's life.[2] During the past two decades that Minnesota and North Dakota have required abortion providers to involve parents in their daughters' decisions to obtain abortions, these states have enjoyed *both* declining teen pregnancy rates as well as declining abortion rates. The absence of an expansive "health exception" that can be invoked by abortion providers has not resulted in the reporting of increased health complications of minors – but

[2] Minn. Dept. of Health, HEALTHY MINNESOTANS: STRATEGIES FOR PUBLIC HEALTH VOL. 2 (2002).

rather, has worked to avoid the predation of young women that has been seen in other states.

The historical recognition of the value of parental involvement in their children's lives, combined with the experience of Minnesota and North Dakota, argues for reversal of the lower courts and affirmation of the constitutionality of the New Hampshire law at issue in this case.

ARGUMENT

I. Parental Involvement Laws Contribute to Teen Well Being.

A. Parental Involvement Laws Insure that Parents Can Protect Their Daughters From Continuing Abuse By Adult Men.

While "[v]ery little attention is given to the important role that parents play in the healthy development of their adolescent children . . . [t]heir importance in the lives of their teens is strongly supported in research, particularly current research on resiliency." Minn. Dept. of Health, HEALTHY MINNESOTANS: STRATEGIES FOR PUBLIC HEALTH VOL. 2 (2002). Minnesota's and North Dakota's experience with their parental notification and consent requirements, respectively, makes this conclusion very plain – parental involvement makes for healthy children – and counsels against this Court from placing a constitutional bar upon needed and beneficial involvement laws.

Research consistently reveals that greater parental supervision and involvement is related to "delaying sexual initiation, using dual contraception, and being less likely to become pregnant or acquire an STD." Mary B. Short &

Susan L. Rosenthal, *Helping Teenaged Girls Make Wise Sexual Decisions*, 48 Contemp. OB/GYN 84 (2003).

In a study of 609 teenage females, who had been recruited from neighborhoods characterized by high rates of unemployment, substance abuse, violence, and STDs, the girls who reported less parental monitoring were 2.5 times more likely to become pregnant in the six month follow-up period than those who reported greater parental involvement. This finding led researchers to conclude that "interventions designed to increase parental monitoring or adolescent females' perceptions of their parents' monitoring may be effective components of pregnancy prevention programs designed for minority youth." Richard A. Crosby *et al.*, *Low Parental Monitoring Predicts Subsequent Pregnancy Among African-American Adolescent Females*, 1 Pediatric & Adol. Gynec. 43, 45 (2002).

Similarly, a study of 522 females found:

> Adolescents with less parental monitoring were significantly more likely than those perceiving more parental monitoring to report that they did not use condoms during their most recent act of sexual intercourse or to report that they did not use any kind of contraception during their last 5 intercourse occasions. Less perceived parental monitoring was marginally associated with reporting multiple sex partners in the past 6 months and having a sex partner who is believed to have concurrent sex partners. Past and recent use of marijuana was associated with less perceived parental monitoring, as was recent use of alcohol. Adolescents who perceived less parental monitoring were also more likely to report that they had been arrested. Of importance, adolescents reporting less parental monitoring were 1.7 times more likely to have a laboratory-confirmed STD.

Ralph J. Diclemente, *et al.*, *Parental Monitoring: Association with Adolescents' Risk Behaviors*, Pediatrics 1363, 1365 (June 2001).

A state's parental notification or consent requirement plays a role in preventing sexual abuse of minors by insuring that adult sexual predators cannot cloak such relationships in secrecy. According to a 2005 study sponsored by the Minnesota Organization on Adolescent Pregnancy, Prevention and Parenting, 26% of the fathers of children born to teen mothers who were fourteen and younger, were men who were twenty years of age or older. Men who were twenty years of age or older fathered 46% of the children born to Minnesota teen mothers who were between the ages of fifteen and seventeen. Lisa Turnham, *2005 Minnesota State Adolescent Sexual Health Report* at 3 available at http://www.moappp.org/Documents/2005AdoHealthReport.pdf.

North Dakota teens, who were eighteen or younger, were impregnated by men four or more years older 30% of the time. Child Trends, *Facts at a Glance 2005* at 4, available at http://www.childtrends.org/files/Facts_2005.pdf.

While these percentages are disturbingly high, they are still significantly smaller than the 71% found by the most comprehensive study of teen pregnancies done to date. In a study of over 46,000 pregnancies by school-age girls in California, *a state having no parental notification or consent law*, researchers found that:

> 71%, or over 33,000, were fathered by adult post-high-school men whose mean age was 22.6 years, an average of 5 years older than the mothers. . . . Even among junior high school mothers aged 15

> or younger, most births are fathered by adult men 6-7 years their senior. *Men aged 25 or older father more births among California school-age girls than do boys under age 18.*[3]

Other studies have also found that most teenage pregnancies are the result of predatory practices by men who are substantially older.[4]

By encouraging and increasing the contacts between young women and their parents, the Minnesota and North Dakota laws have, as detailed below, been successful in contributing to the health and well being of these young women.

---

[3] Mike A. Males, *Adult Involvement in Teenage Childbearing and STD*, LANCET 64 (July 8, 1995) (emphasis added).

[4] *Id.* citing HP Boyer and D. Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment*, FAM. PLAN. PERSPECTIVES at 4 (1992); and HP Gershenson, *et al.*, *The Prevalence of Coercive Experience Among Teenage Mothers*, J. INTERPERS. VIOL. 204 (1989). "Younger teenagers are especially vulnerable to coercive and nonconsensual sex. Involuntary sexual activity has been reported in 74% of sexually active girls younger than 14 years and 60% of those younger than 15 years." American Academy of Pediatrics Committee on Adolescence, *Adolescent Pregnancy – Current Trends and Issues: 1998*, 103 PEDIATRICS 516 (1999), also available on the worldwide web at <http://www.aap.org/policy/re9828.html>. *See also*, M. Joycelyn Elders and Alex E. Albert, *Adolescent Pregnancy and Sexual Abuse*, 280 JAMA 648 (1998).

B. Due, in part, to Parental Involvement Laws Minnesota and North Dakota Have Two of the Lowest Teen Pregnancy Rates in the Country.

1) North Dakota, with its two-parent consent law, has the lowest teen pregnancy rate in the country.

North Dakota enacted a two-parent consent law related to abortion in 1981. It has the lowest teen pregnancy rate in the nation. On average, twenty-one out of a thousand North Dakota teens, ages fifteen to seventeen, became pregnant in 2000. *See* Alan Guttmacher Institute, *U.S. Teenage Pregnancy Statistics: Overall Trends by Race and Ethnicity and State by State Information* (updated Feb. 19, 2004) available at http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf. From 1980 to 1990, while teen birth rate generally increased across the nation, North Dakota was one of eight states that experienced more than a ten percent decline in teen pregnancies. Center for Disease Control, *Teen Pregnancy and Birth Rates – United States, 1990*, 42 Morbidity and Mortality Weekly 733, 735 (Figure 1) (Oct. 1, 1993). "In 1996, the state rate was less than one-half the national rate." Terry Bohn, ed., *Maternal and Child Health Status* p. 41 (2002) available at http://www.ndmch.com/publications/MCHHealthStatusStatistics2002.pdf. Pregnancies of North Dakota teens ages fifteen to seventeen from 1992 to 2000 declined 28% overall. Alan Guttmacher Institute, *U.S. Teenage Pregnancy Statistics: Overall Trends by Race and Ethnicity and State by State Information* (updated Feb. 19, 2004) available at http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf.

Within a year of North Dakota's enactment of its parental consent statute, the abortion rates in North

Dakota began to decline. The rate has declined from an all-time high of 3,706 abortions, near the enactment date, to levels where they have been since 1994, of between 1,200 to 1,400 abortions per year. In 2000, North Dakota's abortion rate was 8 per 1,000 women ages 15-19 compared to a teen abortion rate of 24 per 1,000 nationwide. *See* Alan Guttmacher Institute, *U.S. Teenage Pregnancy Statistics: Overall Trends by Race and Ethnicity and State by State Information* (updated Feb. 19, 2004) available at http://www.guttmacher.org/pubs/state_pregnancy_trends.pdf.

2) Minnesota, with its two-parent notification law, has the fourth lowest teen pregnancy rate in the country.

With the exception of a four-year period during which the law was entirely enjoined subject to judicial review, Minnesota had required some form of parental notification of an immature minor's intent to obtain an abortion since August 1, 1981. *See, Hodgson v. Minnesota*, 497 U.S. 417, 429-33 (1990). During the first decade in which the Minnesota law took effect, the results were dramatic:

- Total pregnancies among teenagers under the age of 18 decreased by 27%.
- The pregnancy rate went down 19%.
- The birth rate for teens decreased by 18%.
- The total number of abortions decreased by 34%.
- The abortion rate decreased by 26%.

See, Center for Health Statistics, Minnesota Department of Health, *Pregnancy Outcomes and Pregnancy Rates by Age of Women, Minnesota Residents*, 1980-1988, 1990. In

the years just before the law was enacted in 1981, all of these figures increased. *Id.*

Moreover, the data reveals that there has been a sustained change for the better. During this period, Minnesota's rates of teen pregnancy remained significantly lower than other states – approximately half of the same rates for girls 13 to 17 as the national average and at least one-third less than the United States' average among all teens. This consistent pattern of decline after the enactment of the parental notification law supports the conclusion that the law has facilitated pregnancy avoidance among teens. *See* J.L. Rogers, et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 Amer. J. Pub. Health 294–298 (1991); Charlotte Ellertson, *Mandatory Parental Involvement in Minors' Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana*, 87 Amer. J. Pub. Health 1367–1374 (1987); and Phillip B. Levine, *Parental Involvement Laws and Fertility Behavior*, 22 J. Health Econ. 861, 871 (Sept. 2003) (finding that abortion rates decline with no increase in teen births).

II. There Is No Evidence that the Absence of a "Health Exception" Has Adversely Impacted Minnesota Minors.

During the initial six years when parental notification was required, there was not a single report of medical complications caused by the law, or a single case of parental prevention or coercion of an abortion. *See* Hubert H. Humphrey, III, Attorney General of the State of Minnesota, *Background Briefing Concerning the Minnesota Parental Notification Law* at 3 (attached as "Appendix A"). *See also* Brief of Cross Petitioners at 10-11, 18, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) and Brief of Association of

American Physicians and Surgeons at 23-25, *Hodgson v. Minnesota*, 497 U.S. 417 (1990). A review of the Health Department statistics following the *Hodgson* case make clear that the nature and extent of complications remain stable over time – and unrelated to the state's parental notification law. *See* "Appendix B."

To the contrary, the success Minnesota has enjoyed in simultaneously reducing its teen pregnancy and abortion rates argues in favor of preserving parental involvement.

CONCLUSION

For all the foregoing reasons, *amici curiae* respectfully urge the Court to reverse the judgments of the lower courts.

Respectfully submitted,

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August 2005

Complications of Induced Abortions
Minors (< age 18)

	Total	Heavy Bleeding	Infection	Incomplete Abortion	Failed Abortion	Post-Abortal Syndrome	Cervical Injury	Fever	Uterine Perforation	Other
1991	5	2	0	2	0	0	0	1	0	0
1992	11	2	4	0	0	4	1	0	0	0
1993	6	2	0	2	1	1	0	0	0	0
1994	10	5	2	1	0	1	0	0	0	1
1995	5	3	0	0	0	2	0	0	0	0
1996	6	3	0	2	0	1	0	0	0	0
1997	1	1	0	0	0	0	0	0	0	0
1998	5	0	1	2	0	0	0	0	1	1

--------change in reporting form*----------

	Total	Heavy Bleeding	Cervical Laceration	Uterine Perforation	Other
1999	9	0	6	1	2
2000	3	1	1	0	1
2001	2	0	1	0	1
2002	3	1	2	0	0
2003	4	0	4	0	0
2004	2	0	2	0	0

*Note: Age of patient is not collected on the form for reporting post-operative complications, thus, only intra-operative complications are included in this table.

State of Minnesota

OFFICE OF THE ATTORNEY GENERAL

[SEAL]

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BACKGROUND BRIEFING CONCERNING THE MINNESOTA PARENT NOTIFICATION LAW

On November 29, 1989, the United States Supreme Court will hear arguments in the cases of *Hodgson et. al. v. State of Minnesota et. al.* and *State of Minnesota et. al. v. Hodgson et. al.* concerning the constitutionality of a Minnesota law which generally requires that the parents of minors be notified at least 48 hours before an abortion is performed upon their daughter.

Because of the volume of inquiries we have received about this case, this briefing paper has been prepared to clarify the provisions of the Minnesota law and the issues involved in the case.

The Statute

The statute in question is Minnesota Statutes section 144.343, subdivisions 2-7. The statute was enacted by the Minnesota legislature in 1981. A copy of it is attached for your reference.

This Minnesota law is unique in that it contains alternative versions for notification. The first, sometimes called the "pure notice" version, requires that the physician or an agent make a reasonably diligent effort to notify the parents of a minor at least 48 hours before an abortion is performed upon her. The notice must be written and can

be delivered either in person or by certified mail. If the notice is mailed, it is deemed to be received at noon on the next mail delivery day after mailing. The notice alone is sufficient to satisfy the law. No consent or other action of the parents is required.

The notice requirement does not apply to:

1. Minors who are emancipated (living apart from parents, managing her own affairs or has been married or had a child).
2. Parents who are deceased or can't be located through reasonably diligent effort.
3. Cases where prompt abortion is needed to save the girl's life.
4. Girls who de are that they have been the victim of abuse or neglect.
5. Cases where the parents have consented to the abortion.

The second version is the "notice/bypass" alternative. This version provides that if the "pure notice" law is enjoined by a court, then the notice provisions of the law explained above shall be in effect with the addition of a court/bypass option. That option allows a girl who does not want to notify her parents to obtain an abortion without parental notice if a judge determines that either (1) she is "mature" enough to consent to the abortion on her own, or (2) if not, her "best interest" would be served by going ahead without notice to her parents. The law requires that the court process be free, expeditious and confidential.

History Of The Case

On July 30, 1981, two days before the law was to take effect, a number of minors, a parent of one minor and four abortion clinics (the "plaintiffs") began an action in federal court challenging the Minnesota law under both the state and federal constitutions. Enforcement of the "pure notice" version of the law was restrained by the court before its effective date. However, the court did not restrain the "notice/bypass" version which went into effect on August 1, 1981. The "notice/bypass" version remained in effect until November 6, 1986 when further enforcement was enjoined by the district court following a lengthy trial.

The state appealed to the Eighth Circuit Court of Appeals. On August 27, 1987 a three-judge panel of the court affirmed the district court decisions. The state sought, and was granted, a rehearing by the entire Eighth Circuit Court of Appeals. On August 8, 1988, the court of appeals issued its decision which affirmed the district court decision that the "pure notice" version of the law was unconstitutional. However, the circuit court overturned the district court judgment as to the "notice/bypass" version and found it to be constitutionally permissible under controlling Supreme Court precedents.

Because the circuit court stayed its mandate to allow the plaintiffs time to seek review by the U.S. Supreme Court, the law did not become again enforceable as a result of the decision. On January 5, 1989, the plaintiffs petitioned the Supreme Court for review of the circuit courts decision upholding the notice/bypass version of the law. That petition is captioned *Hodgson et. al. v. State of Minnesota et. al.*, Supreme Court file number 88-1125.

On February 2, 1989, the state filed a cross-petition seeking review of the circuit's decision striking down the "pure notice" version of the law. That case is captioned *State of Minnesota et. al. v. Hodgson et. al.*, Supreme Court File Number 88-1309.

On July 3, 1989, the same day that it announced the *Webster* decision, the Supreme Court agreed to hear both the petition and the cross petition. This granting of review has the effect of further staying to the decision of the Eighth Circuit so the law remains unenforceable.

The Argument

While some have suggested that the Minnesota case, along with cases from Ohio and Illinois may be used to urge the court to overrule its decision in *Roe v. Wade*, the state of Minnesota does not seek the reconsideration of *Roe*, nor is any retreat from *Roe* needed to uphold either the Minnesota pure notice or notice/bypass law. Both versions of the law permit a pregnant girl to decide with her doctor whether to have an abortion without the consent of anyone else. It merely requires that, where the girl is not abused or emancipated and there is no life threatening emergency, her parents be informed of the impending abortion in advance.

Pure Notice

The concept that the "custody, care and nurture of children reside first in the parents" is a cardinal principle in our society. Indeed the right of parents to raise and educate their children was one of the established concepts noted in *Roe v. Wade* itself.

The Supreme Court has recognized that the right to abortion is not absolute but must be considered against other important state interests. In the specific case of minors, the Court has determined that the state has an important interest in promoting parental involvement in a critical time in a child's life resulting from pregnancy and an abortion. Because of the unique and nonpostponable nature of the abortion decision, however, the Court has determined that parents cannot be given an absolute veto power over a minor's abortion decision. Therefore, the Court has held that a state may require parental *consent* to a minor's abortion but only if it also provides for recourse to a court alternative to obtaining consent.

The state of Minnesota argues that since the notice requirement gives no one a legal veto over the minor's abortion decision, no court bypass should be needed. The notice requirement represents a permissible balance between the abortion rights of minors and the strong and proper interests of the state and parents in parental involvement in crises in the lives of children.

The fact that there may exist some unhelpful obstructive or even abusive parents is not a sufficient reason to deny the majority of parents knowledge of their daughters crisis. In fact, during the period when the notice/bypass law was in effect, fear of abuse or obstruction was given by girls as the reason to avoid notice in only a small minority of cases. The most common reason was "fear of damaging the parent-child relationship."

Notice/Bypass

The notice/bypass law was in effect for some five years. The evidence indicates that the proportion of

minors whose parents were notified at least doubled during the time the law was in effect. Approximately 40 to 50 percent of minors, however, elected to pursue the bypass option. Of the 3,533 who went to court between August 1, 1981 and March 1, 1986, most were granted permission to obtain an abortion without parental notice. The district court found that the bypass system operated in an expeditious and confidential manner as required by the Supreme Court guidelines.

The plaintiffs assert that the record of the notice/bypass system in actual operation demonstrates that it resulted in unconstitutional burdens to Minnesota minors. However, after some five years of the statute's operation, the evidence does not disclose a single instance of abuse or forceful obstruction of abortion for any Minnesota minor. The plaintiffs also conceded that there was no evidence of any increase in medical complications which could be attributed to the law. Thus, it is the position of the state that the record of the Minnesota law in actual operation provides no basis for the Supreme Court to abandon the principles it has set forth for establishing permissible parental involvement in children's abortion decisions. To the contrary, it demonstrates that a notice/bypass system can work confidentially and expeditiously with out [sic] the occurrence of unfortunate consequences which are often predicted.

No. 04-1144

In The

Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY, *Petitioner,*

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *et al.*, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OUT OF TIME AND BRIEF *AMICI CURIAE*

The Governors of Minnesota and North Dakota move for leave to file the attached *amici curiae* brief in this case, notwithstanding that the time for filing such briefs expired on Monday, August 8, 2005. This extension is justified by the fact that counsel for *amici curiae* was attending to her child who had a ruptured appendix and was hospitalized from July 27 to August 3, 2005. The child returned to the hospital briefly for further testing on August 5, 2005 to determine if an abscess had developed.

Counsel has pursued the preparation of this brief with diligence. Counsel for the parties in this case were served electronically on August 15, 2004 to insure minimum delay in their access to its contents. The parties have consented to the filing of this brief.

Respectfully submitted,

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No. 04-1144

IN THE

Supreme Court of the United States

KELLY A. AYOTTE,
Attorney General of New Hampshire,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE AND FORTY-ONE OTHER RELIGIOUS AND RELIGIOUSLY AFFILIATED ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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Cited Authorities

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Other Authorities

The Book of Resolutions of the United Methodist Church (The United Methodist Publishing House 2004) 6

David M. Feldman, Marital Relations, Birth Control, and Abortion in Jewish Law (Schocken Books 1974) (1968) 5

Frances Kissling, Prayerfully Pro-Choice: Resources for Worship (Religious Coalition for Reproductive Choice 1999) 15

Hayim Halevy Donin, To Be a Jew (Basic Books 1972) 5

Laurie Goodstein, "Religious Leaders Back Abortion Ban Veto," Washington Post, Apr. 30, 1996 5

A Legacy of Choice, Church & Society, Nov./Dec. 2002 15

Letter from Religious Coalition for Reproductive Choice, et al. to President William Jefferson Clinton (Apr. 29, 1996) (on file with Religious Coalition for Reproductive Choice) 16

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Oppose Certain Legislation Requiring Parental Consent for Termination of Pregnancy, Journal of the General Convention of the Episcopal Church 1991 (General Convention 1992), *available at* http://www.episcopalarchives.org/cgi-bin/acts_new/acts_resolution.pl?resolution=1991-C037 18

Reaffirm General Convention Statement on Childbirth and Abortion, Journal of the General Convention of the Episcopal Church 1994 (General Convention 1995), *available at* http://www.episcopalarchives.org/cgi-bin/acts_new/acts_resolution.pl?resolution=1994-A054 ..... 7, 14

Religious Institute on Sexual Morality, Justice, and Healing, An Open Letter to Religious Leaders on Abortion as a Moral Decision (2005), *available at* http://www.religiousinstitute.org/Abortion_OpenLetter.pdf 5-6

A Social Statement on Abortion (Evangelical Lutheran Church in America, Department for Studies, Division for Church in Society 1991), *available at* http://www.elca.org/socialstatements/abortion/ 7, 19

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Appendix A: List of *Amici Curiae* 1a

Appendix B: Statements of Interest of *Amici Curiae* 3a

INTEREST OF *AMICI CURIAE*

Amici are religious organizations and religiously affiliated organizations dedicated to preserving religious freedom for all persons and to protecting a woman's health and right to carry or terminate her pregnancy in accordance with her religion and values.[1] The statements of interest provided by *amici*, included in Appendix B to this brief, demonstrate their shared interest (from different perspectives) in the right of women of all ages to make reproductive choices in accordance with their individual conscience and free from governmental interference. A full listing of the forty-two (42) organizations signing this brief as *amici curiae* appears in Appendix A.

Because *amici* value life and health, and recognize the many divergent theological perspectives regarding abortion, *amici* agree that all women whose health is at risk should be free to seek the best available medical advice, without governmental coercion or constraint, in making the difficult decision whether to terminate a pregnancy. Adherence to these principles compels *amici* to support Respondents in this case.

---

1. *Amici* submit this brief *amici curiae* with the consent of the parties. Letters providing consent of the parties are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that the brief in its entirety was drafted by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, or their counsel.

SUMMARY OF ARGUMENT

Many religions, including the varied faiths represented by *amici*, cherish human life and health as among their most important values. Many of these religions hold that it is morally appropriate for women of all ages to consider – in accordance with their faiths – the threat to their lives or health in deciding whether to terminate a pregnancy. The New Hampshire Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. §§ 132:24-132:28 (Supp. 2004) (the "New Hampshire Act" or the "Act"), lacks a health exception and an adequate life exception, as required by this Court's precedents. In emergency medical situations, the Act unconstitutionally threatens the health and lives of young women, and undermines their right to choose an abortion in accordance with religious faiths that place great value on women's health and lives.

The religious component of the rights of privacy and of reproductive choice have been repeatedly recognized in this Court's opinions, including in cases as early as *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and as recent as *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Many Americans reflect upon their religious beliefs and moral principles when making important private decisions about family, marriage, and procreation. The variety of religious teachings and beliefs about abortion underscores the importance of maintaining a private sphere – free from undue government interference – in which women can make choices to protect their own lives and health in accordance with their faiths and their consciences. This private sphere extends to minor women who are faced with pregnancies that threaten their lives and health. Although *amici* support and encourage parental guidance in young

women's major life decisions, including whether to end a pregnancy, they recognize that state-mandated parental involvement can sometimes harm the minor, such as where the family is dysfunctional or where an emergency medical situation requires immediate action. The Constitution protects minors from such threats to their lives, health, and religious beliefs.

ARGUMENT

I. The Act's Inadequate Life Exception and Lack Of A Health Exception Unconstitutionally Restrict Young Women's Access to Safe Abortion Procedures.

The Court has repeatedly held that statutes restricting access to abortions must contain exceptions to preserve the lives and health of women. *See Stenberg v. Carhart*, 530 U.S. 914, 929-30 (2000); *Casey*, 505 U.S. at 879-80; *Roe v. Wade*, 410 U.S. 113, 164-65 (1973). Many religions place a high value on women's health and hold that it constitutes an important – and for some religions, dispositive – factor for women to consider in deciding whether to terminate a pregnancy. *See* Part I.A, *infra*. The absence of an adequate life exception and any health exception in the New Hampshire Act restricts access to abortion in some circumstances where health or life are threatened. The Act therefore represents an unconstitutional threat to young women's health and life, and infringes on their ability to choose an abortion in accordance with religious views that place great value on women's health and life. Because the State of New Hampshire has failed to articulate a persuasive justification for the Act's lack of an adequate life exception and any health exception, the Act is an unconstitutional infringement of the right to make the decision to terminate a pregnancy free from undue government interference. *See* Part I.B, *infra*.

A. Many Religions Place Great Value on the Preservation of the Health and Lives of Women, Including Through Abortion in Appropriate Circumstances.

Diverse religions, including all of the religions represented by *amici*, *see* Appendix B, hold respect for human life and health as one of their most important values. For some faiths, this value is paramount and *requires* that a pregnant woman have the option to choose an abortion when her health or life is at risk. For other faiths, one's health is one of several considerations a woman must weigh in making a personal choice about her pregnancy. In either case, a threat to the life or health of a pregnant woman or teen not only carries potential physical consequences, but also seriously implicates her religious values. State restrictions on women's choices in such circumstances therefore threaten both physical health and religious values.

Some faiths, including the Jewish members of RCRC, believe that a woman's life and health are of paramount importance and that, in some cases, the availability of abortion is a religious necessity. The United Synagogue of Conservative Judaism stated in 1991 that

> under special circumstances, Judaism chooses and requires abortion as an act which affirms and protects the life, well being and health of the mother. . . . [T]o deny a Jewish woman and her family the ability to obtain a safe, legal abortion when so mandated by Jewish tradition, is to deprive Jews of their fundamental right of religious freedom.

United Synagogue of Conservative Judaism Resolution on Abortion, Passed at 1991 Biennial Convention, *available at*

http://www.uscj.org/SocPolAbortion_Contr5481.html; *see also* David M. Feldman, Marital Relations, Birth Control, and Abortion in Jewish Law 271-84 (Schocken Books 1974) (1968); Hayim Halevy Donin, To Be a Jew 140-41 (Basic Books 1972) ("All halakhic scholars agree that therapeutic abortions – namely, abortions performed in order to preserve the life of the mother – are not only permissible but mandatory.").

Christian faiths, including members of RCRC, also place a high value on health and life. *Amici* believe that women's health and life should be respected and safeguarded when a woman considers the ramifications of her pregnancy. Women must be permitted to reflect upon the importance of their own health and lives when they make highly personal, religious decisions about their pregnancies.

Amici are not alone in these beliefs. A colloquium of theologians sponsored by the Religious Institute on Sexual Morality, Justice, and Healing and funded by the Robert Sterling Clark Foundation recently wrote that these principles are shared by many religious traditions:

> Religious traditions have different beliefs on the value of fetal life, often according greater value as fetal development progresses . . . [but] we uphold the teaching of many religious traditions: the health and life of the woman must take precedence over the life of the fetus.

Religious Institute on Sexual Morality, Justice, and Healing, An Open Letter to Religious Leaders on Abortion as a Moral Decision (2005), *available at* http://www.religiousinstitute.

org/Abortion_OpenLetter.pdf. The United Methodist Church has stated:

> Our belief in the sanctity of unborn human life makes us reluctant to approve abortion. But we are equally bound to respect the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy. In continuity with past Christian teaching, we recognize tragic conflicts of life with life that may justify abortion, and in such cases, we support the legal option of abortion under proper medical procedures.
>
> * * *
>
> When an unacceptable pregnancy occurs, a family – and most of all the pregnant woman, is confronted with the need to make a difficult decision. We believe that continuance of a pregnancy which endangers the life or health of the mother, or poses other serious problems concerning the life, health, or mental capability of the child to be, is not a moral necessity. In such cases, we believe the path of mature Christian judgment may indicate the advisability of abortion. We support the legal right to abortion as established by the 1973 Supreme Court decision. We encourage women in counsel with husbands, doctors, and pastors to make their own responsible decisions concerning the personal and moral questions surrounding the issue of abortion.

The Book of Resolutions of the United Methodist Church 44, 129 (The United Methodist Publishing House 2004). The

Evangelical Lutheran Church in America stated in 1991 that it may be morally responsible to terminate a pregnancy where necessary to protect the life of the woman. *See* A Social Statement on Abortion § IV.B (Evangelical Lutheran Church in America, Department for Studies, Division for Church in Society 1991), *available at* http://www.elca.org/socialstatements/abortion/. The Presbyterian Church (U.S.A.) has stated its belief that abortion can be an acceptable moral choice "when necessary to save the life of the woman, [or] to preserve the woman's health in circumstances of a serious risk." Statement on Post-Viability and Late-Term Abortion 2 (Presbyterian Church (U.S.A.) 2003). The Episcopal Church has expressed its opposition to any legislation that would limit women's access to safe means of acting on the decision to obtain an abortion. *See* Reaffirm General Convention Statement on Childbirth and Abortion, Journal of the General Convention of the Episcopal Church 1994, 323-25 (General Convention 1995), *available at* http://www.episcopalarchives.org/cgi-bin/acts_new/acts_resolution.pl?resolution=1994-A054.

Although there is a diversity of religious views on abortion when the health and life of the woman are threatened, many religions agree that the health and life of the woman is an important value that is relevant to the difficult choice of whether to continue or terminate a pregnancy. As discussed in the next section, the New Hampshire Act at issue here is an unconstitutional restriction of the right of a minor woman to make the decision, in accordance with the dictates of her faith, to preserve her health or even life by terminating a pregnancy.

B. The Absence of Adequate Life and Any Health Exceptions in the Act Results in an Unconstitutional Threat to Minors' Health and Religious Values.

The New Hampshire Act contains no exception for the health of the young woman, and as the First Circuit recognized, it contains an inadequate exception for the life of the young woman. In emergency medical situations, these deficiencies threaten minors' health and lives in violation of the teachings of many faiths. For young women belonging to faiths holding that the availability of abortion is a moral necessity when their health or lives are jeopardized, the Act's inadequate emergency exceptions force them to violate the teachings of their religions. For young women belonging to faiths that encourage consideration of health and life in making a decision in accordance with their religious values, the Act's lack of these constitutionally-mandated exceptions preempts the searching moral reflection reflected in these faith traditions. New Hampshire's stated interests in support of the Act have little force when a minor's health or life is at risk. Accordingly, the Act's restrictions cannot be sustained.

The Court has held on several occasions that abortion regulations must contain exceptions to preserve the life and health of women. *See Stenberg*, 530 U.S. at 929-30; *Casey*, 505 U.S. at 879-80; *Roe*, 410 U.S. at 164-65. These constitutionally-mandated exceptions safeguard the health and lives of women, and they permit young women to choose to terminate a pregnancy in accordance with religious beliefs that place a high value on health and life.

Because the Act contains no explicit health exception, it will force some young women in endangered health to forego or postpone abortions while they wait for judicial bypasses

to occur or for the 48-hour waiting period following parental notification to elapse. *See* Goldner Decl. ¶¶ 9, 12, 13, Jt. Appx. at 24-26. In addition to posing a threat to their physical health, this requirement undermines some minors' religious faith. Women whose religion requires that they have the option to choose an abortion in these circumstances are prevented from exercising their faith, while women whose religion encourages them to make a conscientious personal decision in light of the importance of the value of health and life are deprived of an authentic moral choice. This dilemma applies with equal force in situations where the inadequate life exception poses a risk to young women's lives.

The state interests underlying the Act – providing minors with parental guidance and promoting minors' health by giving a parent the opportunity to provide medical history information, *see* Petitioner's Br. at 6 – simply cannot justify its lack of exceptions to account for an emergency which threatens the life or health of the minor and in which insufficient time exists to notify a parent or to obtain a judicial bypass. In those circumstances, parental involvement cannot help before it is too late. But the New Hampshire Act would still mandate that a woman needlessly delay an abortion, even if it threatens her life or health, and force her to ignore the teachings of her faith. Because Petitioner offers no state interest that would justify this result, the Act's lack of a health exception and an adequate life exception is unconstitutional.

II. Minor Women Should Have the Privacy to Make the Decision Whether to Terminate a Pregnancy in Accordance with their Religious Beliefs.

A. The Right to Choose an Abortion Implicates Religious Values As Well As Privacy.

The role that religious values play in a woman's decision whether to terminate a pregnancy, and whether to terminate a life or health-threatening pregnancy, are reflected in the precedents of this Court establishing the constitutional right of reproductive choice.

The Constitution protects the rights of individuals to make personal decisions relating to marriage, procreation, contraception, child birth, family relationships, child rearing, and education free from undue government interference. *See Casey*, 505 U.S. 833, 851 (1992). Although doctrinally grounded in the right to privacy encompassed by the Due Process Clauses of the Fifth and Fourteenth Amendments, *see Roe*, 410 U.S. at 153, the Court has repeatedly recognized that these personal decisions are intimately bound with individuals' religious views. The reproductive rights recognized in *Roe* and *Casey* thus protect women's religious values, in addition to their privacy.

In reaffirming the central holding of *Roe* in *Casey*, the Court explained that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." *Casey*, 505 U.S. at 849 (citations omitted). The Court recognized the religious interest underlying this principle as applied in the abortion context:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter. . . .
>
> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. at 850-51; *see also id.* at 852 ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

The *Casey* Court's articulation of the liberty interest in the Due Process Clause encompasses two distinct but related aspects: (1) an individual's right to make important, life-defining decisions free from undue governmental interference; and (2) a prohibition on government enforcement of a single approach to such important decisions, because people have

various religious views about them. This formulation is strikingly similar to the Court's jurisprudence relating to the First Amendment's religion clauses. The prohibition against legislation "respecting an establishment of religion or prohibiting the free exercise thereof," U.S. Const. amend. I, has a "double aspect":

> On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The "individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority." *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985).

In addition to sharing this "double aspect," the *Casey* Court's emphasis on freedom of conscience is also an important theme of the Court's religious liberty cases. *See id.* at 53; *McCreary County, Kentucky v. Am. Civil Liberties Union*, 125 S. Ct. 2722, 2746, 162 L. Ed. 2d 729, 761 (2005) (O'Connor, J., concurring) ("Our guiding principle has been James Madison's – that '[t]he Religion . . . of every man must be left to the conviction and conscience of every man.'") (quoting Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183, 184 (G. Hunt ed. 1901)). Indeed, freedom of conscience is so fundamental that it has been identified as "the central liberty that unifies the various Clauses in the First Amendment." *Wallace*, 472 U.S. at 50.

The interconnections between the Court's religious liberty cases and its privacy jurisprudence are not surprising. Decisions concerning the most private and "personal choices a person may make in a lifetime," *Casey*, 505 U.S. at 851 – such as decisions about family, marriage, procreation, and personal autonomy – are the same decisions for which many, if not most, Americans draw guidance from their religious beliefs. The diversity of religious views about these issues, *see* Part II.B *infra*, confirms that they should remain in a private sphere, unburdened by government intrusion, where individuals can follow the dictates of their faiths.

Casey was not the first decision to recognize that religious freedom forms an important part of the privacy and liberty interests protected by the Due Process Clause. In *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), the Court affirmed the right of parents to select private, religious schools for their children. In the abortion context, the Court has long recognized that religious beliefs significantly inform many people's views about abortion. *See Roe*, 410 U.S. at 116 ("One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and color one's thinking and conclusions about abortion."); *see also United States v. Vuitch*, 402 U.S. 62, 78 (1971) ("Abortion statutes deal with conduct which is heavily weighted with religious teachings and ethical concepts.").

It is therefore clear that in safeguarding women's reproductive rights, the Constitution also protects a woman's right to remain true to her faith. The Court's prohibition of government regulations imposing an "undue burden" on

abortion, *see Casey*, 505 U.S. at 876, preserves women's freedom to make important decisions about their lives and their health in accordance with their religious values.

B. The Variety of Religious Views Regarding Abortion Justifies Protecting a Woman's Right to Terminate Her Pregnancy Free From Undue Government Interference.

There are diverse theological perspectives regarding abortion, and many different views regarding the morality of abortion, even within individual denominations and religions. The plurality of religious views regarding abortion is a testament to the intensely personal nature of this decision, and as discussed in Part II.A above, justifies its protection from undue governmental mandates or interference.

The Episcopal Church first acknowledged its support for women's right to choose abortion free from governmental interference in 1967. In that year, the General Convention expressed its "unequivocal" opposition to any governmental act that "abridges the right of a woman to reach an informed decision about the termination of pregnancy." Reaffirm General Convention Statement on Childbirth and Abortion, Journal of the General Convention of the Episcopal Church 1994, 325 (General Convention 1995), *available at* http://www.episcopalarchives.org/cgi-bin/acts_new/acts_resolution.pl?resolution=1994-A054.

Official Roman Catholic doctrine makes the contrasting pronouncement that abortion is immoral. *See, e.g.*, U.S. Catholic Conference, Statement on Abortion (1985), in The Churches Speak on Abortion 17 (J. Gordon Metton ed., Gale Research Inc. 1989). Some Roman Catholics, however, have

advocated religious views that would tolerate abortion in certain circumstances. For example, Catholics for a Free Choice has stated that there "is much in the Catholic tradition that supports the pro-choice position. . . . [A] careful reading of church documents shows that while the prohibition of abortion is a serious teaching, room remains for Catholics to support the legalization of abortion and even its morality in a wide range of circumstances." Frances Kissling, Prayerfully Pro-Choice: Resources for Worship 112 (Religious Coalition for Reproductive Choice 1999).

As indicated in Part I.A., *supra*, there is agreement within the Jewish tradition that abortion is to be permitted, and is sometimes a required option, in situations where the life or health of the woman is threatened.

The Presbyterian Church has stated:

> The Presbyterian Church exists within a very pluralistic environment. Its own members hold a variety of views. It is exactly this plurality of beliefs that leads us to the conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, free from governmental interference.

A Legacy of Choice, Church & Society, Nov./Dec. 2002, at 81 (quoting Presbyterian Church (U.S.A.), "The Covenant of Life . . ." (1983)).

Similarly, the United Methodist Church encourages women, "in counsel with husbands, doctors, and pastors to make their own responsible decisions concerning the personal

and moral questions surrounding the issue of abortion." The Book of Resolutions of the United Methodist Church 129 (The United Methodist Publishing House 2004).

In 1996, sixty-nine religious leaders wrote to President Clinton to express their opposition to federal "partial birth abortion" legislation. They wrote:

> We are convinced that each woman who is faced with such difficult moral decisions must be free to decide how to respond, in consultation with her doctor, her family and her God. . . . [N]one of us can discern God's will as well as the woman herself, and that is where we believe the decision must remain.

Letter from Religious Coalition for Reproductive Choice, *et al.* to President William Jefferson Clinton (Apr. 29, 1996) (on file with Religious Coalition for Reproductive Choice); Laurie Goodstein, "Religious Leaders Back Abortion Ban Veto," Washington Post, Apr. 30, 1996, at A4.

The wide range of religious views discussed above are expressed in religious teachings across the nation, such as the sexuality education programs offered by most religious denominations in the United States. *Amici* fear that restrictions on abortion like the New Hampshire Act will interfere with these religious teachings concerning the morality of abortion, and will impair minors' ability to protect their health and lives in accordance with their religious values.

C. The Right to Decide to Terminate a Pregnancy in Accordance with Religious Values and Free From Undue Government Interference Extends to Minors.

Amici strongly believe that minors benefit from thoughtful parental guidance in major life decisions, including the decision whether to terminate a pregnancy. *Amici* therefore agree with the United States Conference of Catholic Bishops that families should work together to reach a moral resolution of a significant issue, such as abortion, and that parents should provide support to their minor daughters. *See* Brief *Amici Curiae* of the United States Conference of Catholic Bishops and Roman Catholic Bishop of Manchester in Support of Petitioner at 13. But *amici* and other religious groups oppose legislation that *mandates* parental involvement in the minor's decision.

A decision about abortion involves many factors, including religious beliefs and moral understandings. Those beliefs and understandings are present throughout an individual's life, and although they may change over time, they are not negated by the fact of minority. *See, e.g., Hodgson v. Minnesota*, 497 U.S. 417, 434-35 (1990) (noting that the constitutional "right to make [an abortion] decision do[es] not mature and come into being magically only when one attains the state-defined age of majority.") (internal quotation marks omitted).

This is not to say that young women cannot benefit from the input of their parents in making such a difficult decision. *Amici* believe that minors do benefit from parental support and guidance in the abortion decision. But state-mandated discussion of this decision is inappropriate for many reasons,

including that it may worsen existing problems within some families. Some religious groups have recognized that not all family relationships are healthy, and not all parents are able to provide moral support or thoughtful guidance to their teenage daughters. For example, the Episcopal Church has recognized that mandatory parental involvement may put some minors at risk. *See* Oppose Certain Legislation Requiring Parental Consent for Termination of Pregnancy, Journal of the General Convention of the Episcopal Church 1991, 839 (General Convention 1992), *available at* http://www.episcopalarchives.org/cgi-bin/acts_new/acts_resolution.pl?resolution=1991-C037 (noting that parental involvement laws may put some "minors at serious physical, psychological or emotional risk" where there is "family dysfunction"). This position finds support in the Declaration of Jamie Sabino, which demonstrates that many minors who do not involve their parents in an abortion decision have reason to fear that discussion of their decision will provoke a violent reaction by their parents. *See* Sabino Decl. ¶¶ 12, 14, Jt. Appx. at 40-41 ("Adolescents who previously have been abused by their parents, including being struck, beaten, and subjected to severe verbal harassment, know that stress often triggers an abusive episode and thus realistically fear that news of their pregnancy will lead to an attack."). Her declaration also demonstrates that some minors choose not to involve their parents because they have good reason to believe that parents who are coping with traumatic events will not be able to withstand the additional stress of facing a minor daughter's pregnancy and planned abortion. *See id.* at ¶15, Jt. Appx. at 41 (discussing minors who feared that their parents could not cope with additional stress in situations where, for example, a sibling had recently committed suicide, a mother had been diagnosed with a brain tumor, a father had recently been brutally murdered, and a father had recently had a heart attack).

Concern for minors in unstable or unsafe family situations has prompted some religious groups to suggest that involvement laws should specify other adults that minors may turn to for guidance in an abortion decision. *See, e.g.*, A Social Statement on Abortion § V.D (Evangelical Lutheran Church in America, Department for Studies, Division for Church in Society 1991), *available at* http:///www.elca.org/socialstatements/abortion/ ("If a law requires parental consent when the woman is a minor, it should specify other trusted adults as alternatives if parental involvement is inappropriate or unsafe."); *see also* The Book of Resolutions of the United Methodist Church 130 (The United Methodist Publishing House 2004) (encouraging churches and common society to support laws that provide minors with the capacity to consent to pregnancy-related treatment because although "[p]arental support is crucially important and most desirable . . . , treatment ought not be contingent on such support").

In sum, although *amici* encourage parental involvement in a minor's decision concerning pregnancy, *amici* believe that state-mandated notification without adequate life and health exceptions is inappropriate and inconsistent with minors' ability to protect their health and lives in accordance with their religious values.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A: LIST OF *AMICI CURIAE*

List of *Amici Curiae*:

American Ethical Union
American Humanist Association
American Jewish Committee
Americans for Religious Liberty
Anti-Defamation League
Colorado Religious Coalition for Reproductive Choice
Disciples for Choice
Disciples Justice Action Network
Indiana Religious Coalition for Reproductive Choice, Inc.
Jewish Reconstructionist Federation
Jewish Women International
Kentucky Religious Coalition for Reproductive Choice
Lutheran Women's Caucus
Maryland Religious Coalition for Reproductive Choice
Methodist Federation for Social Action
Michigan Religious Coalition for Reproductive Choice
Minnesota Religious Coalition for Reproductive Choice
Missouri Religious Coalition for Reproductive Choice
NA'AMAT USA
National Council of Jewish Women, Inc.
Nebraska Religious Coalition for Reproductive Choice
New Jersey Religious Coalition for Reproductive Choice
New Mexico Religious Coalition for Reproductive Choice
Ohio Religious Coalition for Reproductive Choice
Oklahoma Religious Coalition for Reproductive Choice
Religious Coalition of Georgians for Choice
Religious Coalition for Reproductive Choice
Religious Coalition for Reproductive Choice of Connecticut
Religious Coalition for Reproductive Choice: New York

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Religious Coalition for Reproductive Choice of Northern California
Religious Coalition for Reproductive Choice of Southern California
Religious Coalition for Reproductive Choice - Texas
Religious Institute on Sexual Morality, Justice and Healing
The Religious Consultation on Population, Reproductive Health and Ethics
Union for Reform Judaism
Unitarian Universalist Association
Unitarian Universalist Women's Federation
United Church of Christ Justice and Witness Ministries
United Synagogue of Conservative Judaism
West Virginia Religious Coalition for Reproductive Choice
Women of Reform Judaism
Women's Alliance for Theology, Ethics and Ritual

APPENDIX B: STATEMENTS OF INTEREST OF *AMICI CURIAE*

Statements of Interest of *Amici Curiae*:

Religious Coalition for Reproductive Choice

The Religious Coalition for Reproductive Choice is the national coalition of religious and religiously affiliated organizations with official statements and positions in support of reproductive choice as an aspect of religious freedom.

RCRC was founded as a project of the United Methodist Church Board of Church and Society in 1973 to bring religious organizations together to demonstrate religious support for the new U.S. Supreme Court decision Roe v. Wade. Originally named the Religious Coalition for Abortion Rights (RCAR), the Coalition expanded its mission in 1993 to include family planning, sexuality education, and health and human services and accordingly changed its name to the Religious Coalition for Reproductive Choice. RCRC is an educational and advocacy organization, incorporated as a 501c3 and 501c4 and headquartered in Washington, DC. Membership is by application only, and organizations meeting criteria for membership are admitted by vote of the Coalition's governing body. Coalition members are religious and religiously affiliated organizations with official statements and positions in support of reproductive choice as an aspect of religious freedom. Members are listed below. Together the member organizations have more than 20 million members in the United States. The Coalition also includes affiliates in 25 states, a national Clergy for Choice Network with about 2,000 members of all faiths, chapters on campuses and seminaries, and the National Black Church Initiative, guided by an advisory group of prominent African American religious leaders.

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Various Coalition members have joined this brief as amici to state their own positions on the case before the Court. Overall, religious organizations in the Coalition hold that a decision about abortion should be made by the individual, in keeping with her religious beliefs and conscience, and without undue government interference or coercion. They oppose enacting any single religious view about the beginning of human life or human personhood into secular law, as that would violate religious beliefs held by others. Thus, the constitutional right to religious freedom underlies the right to make personal moral decisions about childbearing and abortion. In the case of a minor seeking an abortion, these organizations are among the most dedicated proponents of parental guidance while also recognizing that families have different needs and that state-mandated communication can cause harm to young women in some families.

It is well known that religions believe life is sacred, and a gift from God, and that it is a moral responsibility to promote and protect health and well-being, especially of those who are the most vulnerable. In Ayotte v. Planned Parenthood of Northern New England, the overriding concern of the Religious Coalition for Reproductive Choice is the New Hampshire Act's lack of a health exception and inadequate life exception, which unconstitutionally restricts the ability of an individual to protect her health and even her life when they are threatened by a pregnancy. Because the Act does not contain an explicit health exception, it will require some minor women in endangered health to forego or postpone an abortion while they wait for parental notification or judicial bypass to occur. Additionally, the state's interests underlying the Act—providing minors with parental guidance and

promoting minor's health by giving a parent the opportunity to provide medical information—simply do not apply where an emergency threatens the life or health of the minor and there is insufficient time to notify a parent or obtain a judicial bypass.

Thus, our interest in this case is to protect the health and life of vulnerable young women, who may not be able to seek parental involvement or obtain a judicial bypass. Our religious beliefs lead us to conclude that the compassionate response to a young woman in dire circumstances is to help her to obtain medical care without undue delay.

Also supporting this statement of interest are the following affiliates of the Religious Coalition for Reproductive Choice:

- Colorado Religious Coalition for Reproductive Choice
- Indiana Religious Coalition for Reproductive Choice, Inc.
- Kentucky Religious Coalition for Reproductive Choice
- Maryland Religious Coalition for Reproductive Choice
- Michigan Religious Coalition for Reproductive Choice
- Minnesota Religious Coalition for Reproductive Choice
- Missouri Religious Coalition for Reproductive Choice
- Nebraska Religious Coalition for Reproductive Choice
- New Jersey Religious Coalition for Reproductive Choice
- New Mexico Religious Coalition for Reproductive Choice
- Ohio Religious Coalition for Reproductive Choice
- Oklahoma Religious Coalition for Reproductive Choice
- Religious Coalition of Georgians for Choice
- Religious Coalition for Reproductive Choice of Connecticut

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- Religious Coalition for Reproductive Choice: New York
- Religious Coalition for Reproductive Choice of Northern California
- Religious Coalition for Reproductive Choice of Southern California
- Religious Coalition for Reproductive Choice – Texas
- West Virginia Religious Coalition for Reproductive Choice

Member Organizations of the Religious Coalition for Reproductive Choice (as of October 2005)

- American Ethical Union
- American Humanist Association
- American Jewish Committee
- American Jewish Congress
- Anti-Defamation League of B'nai B'rith
- Catholics for a Free Choice
- Central Conference of American Rabbis (Reform Judaism)
- Church of the Brethren Women's Caucus
- Disciples for Choice
- Episcopal Church in the United States of America
- Episcopal Urban Caucus
- Episcopal Women's Caucus
- General Board of Church and Society, United Methodist Church
- General Board of Global Ministries, Women's Division, United Methodist Church
- Hadassah, WZOA
- Jewish Reconstructionist Federation
- Jewish Women International

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- Lutheran Women's Caucus
- Methodist Federation for Social Action
- NA'AMAT USA
- National Council of Jewish Women
- National Service Conference of the American Ethical Union
- North American Federation of Temple Youth
- Presbyterian Church (USA) Washington Office
- Presbyterian Church (USA) Women's Ministries
- Presbyterians Affirming Reproductive Options
- Rabbinical Assembly (Conservative Judaism)
- Society for Humanistic Judaism
- Union for Reform Judaism
- Unitarian Universalist Association of Congregations
- Unitarian Universalist Women's Federation
- United Church of Christ Justice and Witness Ministries
- United Synagogue of Conservative Judaism
- Women of Reform Judaism, The Federation of Temple Sisterhoods
- Women's American ORT
- Women's League for Conservative Judaism
- Women's Rabbinic Network of the Central Conference of American Rabbis
- Young Religious Unitarian Universalists
- YWCA of the USA

American Ethical Union

The American Ethical Union is the federation of Ethical Societies throughout the United States, and is the national headquarters of the Ethical Culture movement. Ethical Culture is a humanistic religious and educational movement inspired by the ideal that the supreme aim of human life is

working to create a more humane society. Our movement recognizes that the ethical decision of whether of not to terminate a pregnancy should rest with the woman, with the advice of her physician, and we consider it an erosion of fundamental human rights when a legislature presumes to make such ethical choices for a woman regarding her reproductive functions.

American Humanist Association

The American Humanist Association is the oldest and largest humanist organization in the nation, dedicated to ensuring a voice for those with a positive, nontheistic outlook. The mission of the AHA is to promote the spread of humanism, raise public awareness and acceptance of humanism, and encourage the continued refinement of the humanist philosophy. One of humanism's core values is to ensure reproductive freedom. The AHA has been working to advance reproductive rights for over forty years.

American Jewish Committee

The American Jewish Committee ("AJC"), a national organization of approximately 150,000 members and supporters with 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. AJC believes that this goal can best be achieved by preserving the constitutional rights, including the fundamental right of access to abortion, of all Americans. In the case of parental notification and consent requirements, AJC believes that such regulations place a substantial burden on a pregnant minor's right to choose the course of action that is safest for her, in keeping with her religious beliefs, and that best protects her ability to bear future children. For these reasons, AJC believes that the statute challenged in this case is unconstitutional.

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Americans for Religious Liberty

Americans for Religious Liberty (ARL) is an ecumenical nationwide nonprofit educational organization, founded in 1982, with approximately 2,500 members, dedicated to defending and advancing freedom of conscience, religious freedom, and church-state separation. ARL has been an amicus in a number of cases before the Supreme Court, including cases on reproductive rights. ARL's consistent position has been that the First Amendment and other sections of the Constitution bar any level of government from interfering with the right of any woman of any age to follow her own conscience in dealing with a problem pregnancy.

Anti-Defamation League

The Anti-Defamation League (ADL), founded in 1913, is a national Jewish human relations organization dedicated to principles of religious and individual liberty, including the right to privacy. ADL views reproductive choice as an issue of personal and religious freedom. Accordingly, ADL believes that a woman's right to make her own decision concerning abortion is constitutionally protected and should be made in accordance with her own religious and moral convictions, without governmental intrusion. ADL has participated as *amicus curiae* in numerous cases before the Supreme Court and other courts when these issues have been implicated, including *Planned Parenthood of Eastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Disciples for Choice

Disciples for Choice was founded May 8, 1995 in Fort Smith, Arkansas and is incorporated in the state of Arkansas.

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Disciples for Choice is an organization of members and friends of the Christian Church (Disciples of Christ in the United States in Canada) dedicated to maintaining reproductive choice for all persons. The organization works to ensure that every woman is free to make decisions about when to have children according to her own conscience and religious beliefs without government interference.

Disciples for Choice have taken an active role in the support of freedom choice in respect of reproductive activity because of our commitment to principles of religious freedom and separation of church and state. Time and again Disciples have spoken to the protection of the right of ALL persons to individual beliefs regarding abortion, whether for or against.

Disciples for Choice oppose any further efforts to limit abortion availability. The basic constitutional protection for abortion applies to females of *all* ages. The parental notification law in question here does not even contain an explicit health exception, it will require some minor women to experience endangered health to forego or postpone an abortion while they wait for parental notification of judicial bypass to occur.

Disciples for Choice encourages the court NOT to further restrict the ability of *any* person to protect her health and perhaps her life when they are threatened by a pregnancy.

Disciples Justice Action Network

Disciples Justice Action Network was founded in 1996 in Chicago, Illinois, and is incorporated in that state and is a 501 C 3 federal tax exempt organization. DJAN understands

itself to be doing and supporting what our faith calls upon us to do; taking strong positions of conscience on social issues, including justice issues within our communion. DJAN operates under a Design (Bylaws) adopted in June, 1996 and is governed by a team (Executive Committee) of twelve persons, with a staff of two, a Director and a Minister of Justice Education. DJAN has just under 2,000 supporters and its constituency is made of churches, other justice issue groups, and individuals.

One of the strongly supported human rights justice issues supported by DJAN is that of women's reproductive rights. Because the Gospel envisions a society in which all are free from oppression, despair, poverty, violence and marginalization, DJAN is compelled to speak against the New Hampshire parental notification law in the case *Ayotte v. Planned Parenthood of Northern New England*

In all instances, women's lives and health must be given paramount consideration in abortion related decisions. We understand the Ayotte case restricts the ability of persons, in this case minor persons, to protect their own health and possibly their lives through limitations and restrictions within this Act.

DJAN urges the Court to not mandate parental support as contingent for a minor's decision concerning pregnancy.

Jewish Reconstructionist Federation

Jewish Reconstructionist Federation is the synagogue arm of the Reconstructionist movement, serving 107 congregations and havurot across North America. A voice of

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Reconstructionist Judaism in the greater Jewish world, JRF provides a wide array of services to its affiliates. People experience Reconstructionist congregations as open, inclusive, and egalitarian, both in principle and in practice. JRF- affiliated communities are autonomous, progressive, and democratic.

The following statement is updated from the JRF 1981 statement in support of the Religious Coalition for Reproductive Choice, an organization that JRF is officially affiliated with:

Although the Jewish tradition regards children as a blessing, a gift of life itself, the tradition permits the abortion of an unborn child in order to safeguard the life and physical and mental health of the mother. The rabbis did not take a consistent stand on the question of whether a fetus resembles a "person." They did not think it possible to arrive as a final theoretical answer to the question of abortion, for that would mean nothing less than to be able to define convincingly what it means to be human.

We recognize that abortion is a painful choice. Any prospective parent must make an agonizing decision between competing claims – the fetus, health, the need to support oneself and one's family, the need for time for a marriage to stabilize, responsibility for other children and the like.

Reconstructionist Judaism recognizes that we live in both religious and civic cultures simultaneously. The law of the United States of America supports a woman's right to obtain an abortion, although limitations and restrictions have been

applied. The JRF likewise supports the preservation and protection of the reproductive rights of women, and the individual right of women to make the painful decision to abort or not to abort.

Jewish Women International

Ayotte v. Planned Parenthood of Northern New England is a case challenging the constitutionality of New Hampshire's parental notification law. This case is the first U.S. Supreme Court case in five years to deal with access to abortion services and the first for the Court in its new composition. The district court and 1st Circuit struck down the law because it lacks a health exception and an adequate life exception. The issue before the Supreme Court is the appropriate standard for facial challenges to abortion statutes.

Jewish Women International (JWI), with the support of our 75,000 members, supporters and partners in over 100 communities around the United States, is recognized as the leading Jewish organization committed to ensuring that women and girls are safe in their homes and relationships. As the former B'nai B'rith Women, JWI has been actively involved in strengthening the lives of women and children for over 100 years. In 1968, prior to *Roe vs. Wade*, our organization issued its first resolution on abortion, calling for abortion laws that would protect women from having to seek often life-threatening, illegal abortions.

Jewish Women International firmly supports the right of all women and girls to reproductive freedom. The ability to exercise choice frees women and girls from the oppression of others making life-shaping decisions for them. Jewish

Women International believes it is the duty of the court to protect a woman, even as a minor, in her right to make individual decisions, independent of a guardian or without a judicial bypass, in cases where her health or life are at risk.

Methodist Federation for Social Action

The Methodist Federation for Social Action (MFSA) is an independent organization uniting United Methodist activists to take action on justice, peace and liberation issues. Since 1907, MFSA has been working primarily through the ministries of the denomination, supporting and augmenting the church's activities on behalf of justice at the local and national level. MFSA has chapters in forty of the sixty United Methodist Church's Annual Conferences within the US.

The Methodist Federation for Social Action affirms the goodness of God's creation and the sacredness of all creation. Therefore, we do not take the question of abortion lightly. We envision a world where every child is a wanted child, while recognizing the realities of an imperfect world. Because we regard all life as sacred, we regard the life, health and well being of the mother to be just as valuable as the potential life of the fetus. We also believe that reproductive issues must remain free from government interference. For secular authority to codify any particular religious tradition or position into law is a violation of the religious liberty of all religious traditions whose teachings differ from that law. We affirm that only the individuals most intimately involved in a crisis pregnancy can adequately weight the factors and values in conflict and come to a decision about the most appropriate course of action. In view of this, we support the right of women, regardless of their age, to choose for

themselves with whom to seek counsel as to whether they should carry their pregnancy to term, keep their child, give their child up for adoption, or terminate their pregnancy.

NA'AMAT USA

NA'AMAT USA is the Women's Labor Zionist Organization of America, Inc. It has sister organizations in fourteen different countries. The international headquarters is located in Tel Aviv, Israel. The term NA'AMAT is a Hebrew acronym meaning "Movement of Women and Volunteers." NA'AMAT USA is currently celebrating its 80th anniversary.

Since its inception, the right to privacy has been an important provision of our movement's mission. Therefore the Pro-Choice issues and all of its ramifications are a significant component of our national policy agenda and our strong advocacy work. NA'AMAT USA welcomes the opportunity to sign on to this important amicus brief: *Ayotte v. Planned Parenthood of Northern New England.*

National Council of Jewish Women, Inc.

The National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide. The National Council of Jewish Women works to ensure and advance individual and civil rights. As such we endorse and resolve to work for "the protection of every female's right to reproductive choice, including safe and legal abortion, and the elimination of obstacles that limit reproductive freedom." Consistent with our priorities and resolutions, NCJW joins this brief.

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Religious Institute on Sexual Morality, Justice and Healing

The Religious Institute on Sexual Morality, Justice and Healing is pleased to join the brief of religious organizations in *Ayotte v. Planned Parenthood of Northern New England* in support of Planned Parenthood. The Religious Institute is an ecumenical, interfaith organization, founded in 2001, to advocate for sexual health, education, and justice in faith communities and society. The Religious Institute network includes more that 2400 clergy, theologians, and religious leaders from more than 40 denominations. These religious leaders are united in their faith-based commitment to sexual and reproductive rights, including access to safe, legal, and accessible abortion services. We call for a health and life exception out of our commitment to the teachings of many religious traditions that the life and health of the woman must always take precedence over the life of the fetus. We support the rights of minors: while we encourage adolescent women to involve parents and family members in their decisions about a pregnancy, we must also acknowledge that not every family can offer this support. All women must be able to make their own moral decisions based on their own conscience and faith.

Union for Reform Judaism

The Union for Reform Judaism ("Union") is the central body of the Reform Movement in North America including 900 congregations encompassing 1.5 million Reform Jews.

We believe that in any decision whether or not to terminate a pregnancy, the individual family or woman must weigh their faith tradition as they struggle to formulate their own religious and moral criteria to reach their own personal decision. We

do not encourage abortion, nor favor it for trivial reasons, or sanction it "on demand." We believe, however, that the proper locus for formulating these religious and moral criteria and for making this decision must be the individual family or woman and not the state or other external agency.

While recognizing the right of religious groups whose beliefs differ from ours to follow the dictates of their faith in this matter, we vigorously oppose the attempts to legislate the particular beliefs of those groups into the law that governs us all. This is a clear violation of the First Amendment. Furthermore, it may undermine the development of interfaith activities. Mutual respect and tolerance must remain the foundation of interreligious relations. We support the legal right of a woman to act in accordance with the moral and religious dictates of her conscience with respect to abortion.

Unitarian Universalist Association

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom. Most relevant to the case at bar are the Association's resolutions specifically supporting the fundamental right of individual choice in reproductive matters and the right of a female to have an abortion at her own request upon medical/social consultation of her own choosing.

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United Church of Christ Justice and Witness Ministries
The United Church of Christ (UCC) was founded in 1957 with the union of the Evangelical and Reformed Church and the Congregational Christian Churches. Today there are more than 6,000 local UCC congregations comprising 1.3 million members. The UCC, through its General Synod, a representative body which meets biennially, has supported access to the full range of reproductive choices for all women since 1971 when a resolution in support of freedom of choice was voted by the 8th General Synod of the United Church of Christ.

The values of freedom, responsibility and covenant form the core of the UCC Constitution. As individual members of the Body of Christ, we are encouraged through prayer, study, dialogue, and discernment of God's will for our lives to make decisions and act in the world in accordance with our beliefs. Being in covenant with one another and with God is an important element of this decision making because our freedom to act comes with responsibility to others. We believe that the word of God, which is the basis of our faith and contains many eternal truths, is not a fixed and final word. As John Robinson said, "There is yet more truth and light to break forth from God's holy word."

Our religious heritage also stresses reverence for human life, the enhancement of human life and the protection of the rights of persons. Through the years, UCC General Synods have affirmed the call to celebrate and nurture life, including the protection of the health and well-being of those confronted with the difficult choice of whether or not to terminate a pregnancy. Given that theological and scientific views on

when human life begins are so numerous and varied, the actions of UCC General Synods have affirmed that every woman must have the freedom of choice to follow her personal and moral religious convictions concerning such a decision.

We are deeply concerned that the New Hampshire law regarding parental notification lacks a health exception and would thereby unconstitutionally restrict the ability of an individual (in this case a minor) to protect her health and even her life if threatened by a pregnancy which posed such risks. The minor's mental health is also an essential condition of health. In the instance in which an emergency threatens the life or health of a minor, and there is insufficient time to notify a parent or obtain judicial bypass, we would assert that the state's interest in the Act does not apply. We recognize that the majority of minor girls who become pregnant do inform their parents who assist them in making an appropriate decision, but we also know that there are some situations when minors cannot inform their parents or legal guardian of a pregnancy. These young women must not bear an undue burden of parental notification.

The United Synagogue of Conservative Judaism

The United Synagogue of Conservative Judaism, also known as USCJ, was founded in 1913 as the association of Conservative synagogues in North America. The United Synagogue of Conservative Judaism promotes the role of the synagogue in Jewish life in order to motivate Conservative Jews to perform *mitzvot* (commandments) encompassing ethical behavior, spirituality, Judaic learning, and ritual observance. USCJ encompasses over 700 synagogues in the United States with approximately 1.5 million congregants.

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When unfortunate circumstances, such as when the life or health of the mother is in jeopardy, Judaism sanctions, even mandates abortion. While Judaism does not provide a blanket pro-abortion stance, we support maintaining the legality and accessibility of abortion so that in those cases where our religious authorities determine that an abortion is warranted according to Jewish law, obtaining that abortion will not be hindered by our civil law. Therefore, USCJ has a vested interest in ensuring that our members can fulfill their religious obligations.

Women of Reform Judaism

Women of Reform Judaism, an affiliate of the Union of Reform Judaism, is the collective voice and presence of women in congregational life. Founded in 1913, Women of Reform Judaism is comprised of 75,000 women in 550 local groups nationwide. Committed to the teachings of our tradition, we are mandated by our resolutions to serve humanitarian causes, including women's health and well-being. Our comprehensive 1989 Reproductive Rights resolution calls for "the right of every woman, without regard to age or socioeconomic condition, based on her own religious and moral convictions, to make her own choices about reproductive life."

Women's Alliance for Theology, Ethics and Ritual

The Women's Alliance for Theology, Ethics and Ritual (WATER) is a non-profit educational center that provides resources, networking and education that encourage feminist work in religion. WATER was founded in 1983 by Mary E. Hunt and Diann L. Neu as an interreligious organization. The Alliance connects thousands of people of various faiths and encourages creative, religiously-informed social justice work.

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WATER colleagues hold a wide variety of opinions on abortion, the overwhelming majority of which are pro-choice. As such, WATER supports a woman's right to choose and claims that a good society makes that possible. In the case of *Ayotte v. Planned Parenthood of Northern New England*, we believe that the lack of an explicit health exception and inadequate life exception unconstitutionally restrict the ability of a young woman to protect her health when she is pregnant. Should such exceptions not be available, a young woman risks serious health consequences while awaiting parental notification of judicial bypass. There is no religious justification for such injustice.

We therefore join as *amici* in the case of *Ayotte v. Planned Parenthood of Northern New England.*

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(27)

Case No: 04-1144

In the

Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL
OF NEW HAMPSHIRE

Petitioner

v.

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND, CONCORD FEMINIST
HEALTH CENTER, FEMINIST HEALTH
CENTER OF PORTSMOUTH,
AND WAYNE GOLDNER, M.D.

Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF OF THOMAS SHARPE, M.D. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS

No counsel for any party authored any portion of this brief. No persons other than the amicus curiae made a monetary contribution to the preparation and submission of this brief. The written consents of the parties will be filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3

Amicus is former Director of Adolescent Obstetrics at two major New York University Hospitals. Former Director of Obstetrics and Gynecology of E.J. Noble Hospital, Gouverneur, NY., where amicus conducted the practice that was known to carry the highest number of pregnant adolescents in the state to delivery of babies. Amicus served as prosecution witness for the New York County District Attorney for child sexual abuse cases Amicus believes that its view will complement the brief of the Respondent and assist the Court in the resolution of issues.

SUMMARY OF ARGUMENT.

The states of the Union in the spirit of Federalism maintain an Abortion Surveillance - United States, With the CDC being the executor. All states participate in the surveillance with the exception of Alaska California and New Hampshire.
With the Supreme Court being the principal forum of abortion regulation, the Abortion Surveillance- United

States system works under the Supreme Court's implied authority.

The non participants in the Surveillance flout the Court's implied authority. A state like New Hampshire outside of the surveillance should not ask for the intervention of the Court, whose authority it flouts.

Adolescent obstetricians will not be able to evaluate the effects of the law, New Hampshire proposes because there will be no objective reports at their disposal.

ARGUMENT.

During the current controversy a father broke into the media. The father complained, that his mentally disabled daughter had two abortions in New Hampshire without his or his wife's knowledge. Names and the nature of mental disease was not released.

New Hampshire Parental Notification Prior to Abortion Act (N.H. REV. STAT. ANN. #132:24-28) serves the complaining father well. It has a judicial bypass and that has a keystone: demonstrated maturity. The complainant father must be satisfied, it won't happen again to his mentally challenged daughter.

Or would it? Judging from the history presented about this family, their daughter is out of adolescence by now. So on the day this notification law is ruled constitutional the girl might have a third (enforced) abortion because she would not be protected anymore by the new law.

What do adolescent obstetricians say?

1. NEW HAMPSHIRE IS WAY BEHIND OTHER STATES IN PROTECTING WOMEN UNDERGOING OR CONSIDERING ABORTION.

Other than the proposed notification law New Hampshire does not provide even rudimentary protection for women considering abortion.

New Hampshire does not have informed consent law, New Hampshire is far behind other states in assuring abortion clinic regulations which implement the certification and licensing of abortion clinics, New Hampshire does not have a law restricting to licensed physicians the performance of abortion, the state simply does not have a position on on the question of fetal viability.

The State of New Hampshire does not ensure complete information on the alternatives to abortion and the availability of public assistance to help women who want to carry their pregnancies to term.

For a state lacking in ground work to provide safe abortions it is not ripe to bring down rulings from this Court that will effect all states.

In neighboring Pennsylvania the judicial bypass caused considerable delay at least at the beginning after US v. Casey was decided in the early 90-s. Physicians complained that court personnel simply did not understand what their role and the role of the court is in the abortion regulation. There were complaints about delays and several reference to loss of time forcing performance of the second trimester abortion instead of the less risky and cheaper procedure in the first trimester.

Sharpe rarely performed abortions during his time in E.J. Noble Hospital, Gouverneur, NY. All those cases were complicated by medical disease, and all abortions were performed in the hospital. The girls- all minors- were brought into the hospital by their mothers, who waited for them during the procedure.

Should there be a mental complication, an adolescent psychiatrist should be consulted.

If the legislature of a state decides that a law is necessary to protect the rights of mentally challenged minors, and their parents, that state should first review its Mental Hygiene Laws and insert whatever law is needed. Such an amendment of mental hygiene laws would be very unlikely target of constitutional challenge.

New Hampshire aimed for more and from the position of the unknown and non communicating lifted into the national spotlight without cooperating with other states.

New Hampshire should consult the CDC Abortion Surveillance - United States for 2001.

Figure 4. of the Surveillance indicates that 15% of minors in the under 15 years of age had late after 15 weeks- abortion 45% had abortion between 9-15 weeks and only 35 % had early abortion before 9 weeks. in the mature group the late abortion was 5%, the 9-15 weeks abortion 35% and the early abortion 60 %. This is what the surveillance is good for, New Hampshire can recognize the minors' most sensitive point: obtaining abortions late. Any further delay in the performance of abortions on minors would further increase the shift towards late abortions, increased costs and complications.

New Hampshire is not willing to release this statistics for the rest of us, to follow the effects of the law.
The illustration on Appendix page 1. is from Abortion Surveillance -United States 2001. The percentage of women obtaining early or late abortions. The risk of obtaining late abortion is higher for the younger age group of minors. This is where the risk factor is, a further shift towards late abortions if further delays are caused. New Hampshire

does not release this information, there will be no way to monitor the effect of the new law.

2. PLANNED PARENTHOOD OF S. PA V. CASEY ALONE IS SUFFICIENT TO REVIEW THE CASE

Planned Parenthood of S. Pa V. Casey, 505 U.S. 833, (1992) has a saving domain finding that just because a law makes practicing a right more difficult the law is not necessarily unconstitutional.

Should the Court find Salerno's no set of circumstances governing (US v. Salerno 481 U.S. 739, 1987) A law the effects of which can not be monitored should fail under this standard too

3. NEW HAMPSHIRE FIRST SHOULD LICENSE ABORTION CLINICS.

A state like New Hampshire where abortion clinics need no certification and licensing by the state should not set example for other states.

Compare with Pennsylvania law: 18 PA. Cons. Stat. Ann. #3215(a) - (c) Enacted 1998

New Hampshire should first restrict the performance of abortions to licensed physicians, because once again a state not setting any standards for the performance of a medical procedure should not set the example for the rest of the states.

Compare with Pennsylvania Law: 18 PA. Cons. Stat. Ann. 3203 (Enacted 1982; Last Amended 1990, 18 PA. Cons. Stat. Ann. #3204 (Enacted 1982; Last Amended 1990)

New Hampshire first should regulate certain aspects

5. THE PETITIONER'S CLAIM THAT THE LAW WOULD ASSIST PROSECUTION OF CHILD SEXUAL ABUSE

The claim that sexual abuse of minors would be easier to prosecute if the notification law is placed into effect is probably correct. Yet the Petitioners statements on this issue are conclusions everybody may draw, the concern and experience of the professional involved in these prosecution is nowhere felt reading the petition. Nor is any reference to adolescents who evade the laws. Amicus is a prosecution witness for child sexual abuse, and generally child abuse cases. Using adolescent witnesses at court, is a special science. For a basic reference we quote Stephen Ceci, Maggie Bruck: Jeopardy in the Courtroom, a Scientific Analysis of Children's Testimony. American Psychological Association, Washington D.C. 1995. To promote the prosecution of these sexual abuses more would be needed, from more experts more concern about the pitfalls, difficulties of these prosecutions. The conclusive statements of petitioner are less convincing..

The Pennsylvania Law provides exemptions for women victims of rape or incest to obtain abortion in a health facility owned or operated by a state entity; if an independent physician certifies that the procedure is necessary to preserve her life,

2. the pregnancy is the result of rape personally reported by the victim to law enforcement agency prior to the abortion, 3. the pregnancy is the result of incest personally reported by the victim to law enforcement agency or to child protective services prior to the abortion. 18 PA. Cons. Stat. Ann. #3215(a)-(c) (Enacted 1998)

The US Court of Appeals upheld the limitation of funding to cases of life endangerment, or rape or incest, holding in the same time that the independent physician certification and the non waivable 72 hour reporting requirement for rape and incest was unconstitutional.Elizabeth Blackwell Health Ctr, for Women v. Knoll 61 F. 3d 170 (3d Cir 1995) Cert. denied 516 U.S. 1093 (1996) Here New Hampshire is competitive with other states.

New Hampshire opened state funding for abortions in case of danger to life and in case of rape or incest. Even here, no information is given to women seeking abortion on these facts, although with such information more reliable support for prosecution of sexual abuse could be obtained. Once again the protection of women by the states in this complex field of sexual abuse would require more information about the petitioner's practices than the mostly conclusive statements of the petition reveal.

We should notice, that no sooner was the instant certiorari granted, than the launch of a fierce attack

against New Hampshire started in the media (The O'Reilly factor) upon the ground that New Hampshire does not have laws against child sexual offenders, tough enough when compared to other states.

CONCUSION.

Amicus agrees with the grating of Certiorari in this time for this vitally important question of adolescent pregnancy.

Amicus calls the Court's attention to the events surrounsing the New Hampshire Parental Notification Prior Abortion Act, and points to the lack of New Hampshire's participation in the Abortion Surbeillance - United States., and thus the lack of sound foundation for followw up on the effects of the law, should it be allowed to be enforced.

Amicus emphasizes the valiant concerns in the petition about prosecution of child sexual abuse, but in the same time emphasizes the complexity of such prosecvutions, which would require more than the conclusory statements in the petition.

Amicus recommends to the Court to affirm the First Circuit decision, holding that the petitioner has ground work to complete within the state, and within the federation of states, before stepping in front of this Court asking for decisions that would effect all states.

DATED: September 15, 2005

Respectfully submitted

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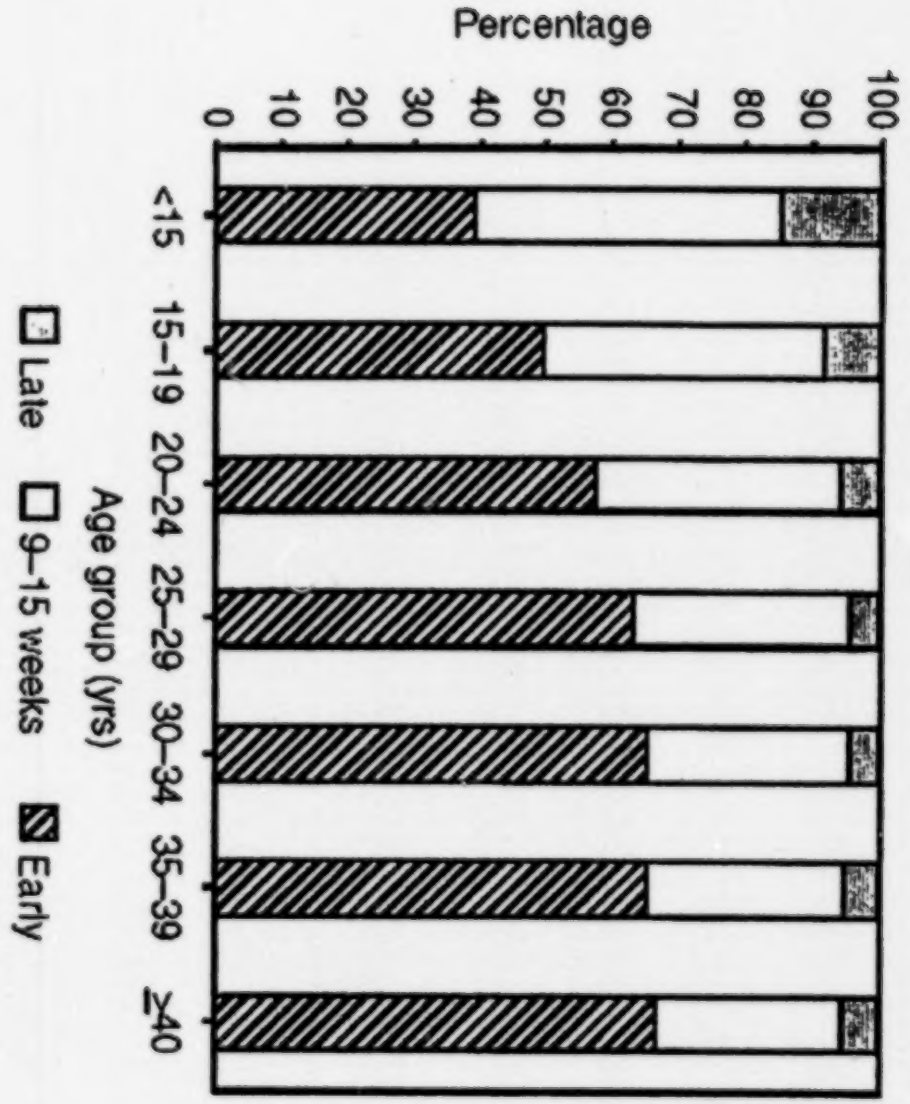
APPENDIX I



Percentage of early or late abortions by age group of women. Abortion Surveillance - United States 2001

APPENDIX 2

NEW YORK STATE INTERFERES BY FORCE AND THREAT OF FORCE, WITH PREGNANT ADOLESCENTS WHO WANT TO DELIVER THEIR PREGNANCY.

In 1996 E.J. Noble Hospital Gouverneur, NY Maternity Service was closed without warning by the administration, board, medical staff, the State University of Syracuse, and the New York State Department of Health.

The distinguishing quality of this Maternity Service was that it delivered the highest number of adolescent pregnancies after carrying them to term in the State and that the highest pecentage of adolescents decided to keep and deliver their pregnancy, and the service attracted pregnant adolescents who wanted to deliver their babies from a wider area than the hospital's usual service area.

The intervention was violent and resulted in the death of dozens of babies and three mothers. The facts of this assault against pregnant adolescents can be viewed in Sharpe v. Conole et al. Petition for Writ of Certiorari 04 - 1130

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No. 04-1144

In the Supreme Court of the United States

KELLY A. AYOTTE, ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,
Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF OF TEXAS, ALABAMA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, IDAHO, KANSAS, MICHIGAN, MISSISSIPPI, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that a facial challenge to New Hampshire's parental-notification statute should not be not governed by the "no set of circumstances" standard articulated in *United States v. Salerno*, 481 U.S. 739 (1987).

2. Whether the court of appeals erred in holding New Hampshire's parental-notification statute facially invalid under *Stenberg v. Carhart*, 530 U.S. 914 (2000).

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INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Petitioner. Forty-three States, including the State of New Hampshire, have laws requiring some form of parental notification or parental consent prior to the performance of an abortion upon a minor.[1] Each of these States has a strong interest in seeing that its particular notification or consent provision, along with any additional state-enacted abortion-related legislation, will not be struck down as facially unconstitutional unless and until such provision has been shown to have no conceivable constitutional application. This longstanding rule, definitively articulated by the Court in *United States v. Salerno*, 481 U.S. 739, 745 (1987), is appropriate for facial challenges to all state statutes regulating conduct, including those regulating abortion-related conduct. The *amici* States urge the Court to reject the court of appeals's conclusion to the contrary.

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1. *See* ALA. CODE §26-21-3; ALASKA STAT. §18-16-060; ARIZ. REV. STAT. §36-2152; ARK. CODE ANN. §20-16-805; CAL. HEALTH & SAFETY CODE §123450; COLO. REV. STAT. §12-37.5-104; DEL. CODE ANN. tit. 24, §1783; FLA. STAT. ANN. §390.01114; GA. CODE ANN. §15-11-112; IDAHO CODE §18-609A; 750 ILL. COMP. STAT. 70/15; IND. CODE §16-34-2-4; IOWA CODE §135L.3; KAN. STAT. ANN. §65-6705; KY. REV. STAT. ANN. §311.732; LA. REV. STAT. ANN. §40:1299.35.5; ME. REV. STAT. ANN. tit. 22, §1597-A; MD. CODE ANN., HEALTH GEN. §20-103; MASS. GEN. LAWS ch. 112, §12S; MONT. CODE ANN. §50-20-204; MICH. COMP. LAWS §722.903; MINN. STAT. §144.343; MISS. CODE ANN. §41-41-53; MO. REV. STAT. §188.028; NEB. REV. STAT. §71-6902; NEV. REV. STAT. §442.255; N.H. REV. STAT. ANN. §132:25; N.J. STAT. ANN. §9:17A-1.4; N.C. GEN. STAT. §90-21.7; N.D. CENT. CODE §14-02.1-03.1; OHIO REV. CODE ANN. §2919.121; OKLA. STAT. tit. 63, §1-740.2; 18 PA. CONS. STAT. §3206; R.I. GEN. LAWS §23-4.7-6; S.C. CODE ANN. §44-41-31; S.D. CODIFIED LAWS §34-23A-7; TENN. CODE ANN. §37-10-303; TEX. FAM. CODE §33.002; TEX. OCC. CODE §164.052(a)(18) (effective Sept. 1, 2005); UTAH CODE ANN. §76-7-304; VA. CODE ANN. §16.1-241; W. VA. CODE §16-2F-3; WIS. STAT. §48.375; WYO. STAT. ANN. §35-6-118.

The *amici* States also have a strong interest in reconsidering the court of appeals's holding that the judicial-bypass alternative provided by New Hampshire's parental-notification statute does not remedy any perceived constitutional defects in the statute's additional exceptions to its notification requirements. Of the forty-three States that require parental notification or consent, forty-one provide for some form of judicial bypass to ensure that its statute's requirements do not result in harm to pregnant minors.[2] These States have justifiably relied on the Court's holding in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), that a judicial-bypass mechanism will cure any constitutional problems caused by "the possibility that, in some cases, [notification or consent requirements] will not work to the benefit of minors . . . ." *Id.*, at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part). At the very least, judicial-bypass provisions like the one contained in New Hampshire's parental-notification statute should suffice to protect state statutes from a summary invalidation in their entirety, on their face, "based upon a worst-case analysis that may never occur." *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) ("*Akron II*"). The *amici* States believe that the court of appeals's contrary judgment should be reversed.

2. The two state parental-notification statutes without a judicial-bypass alternative give the physician discretion to determine if bypassing the notification requirements is necessary. *See* MD. CODE ANN., HEALTH GEN. §20-103; UTAH CODE ANN. §76-7-304.

SUMMARY OF THE ARGUMENT

Those who seek to prevent a properly-enacted state statute from being applied in any and all circumstances should be required to show that it cannot be validly applied in any and all circumstances. That is the rule of *Salerno*, 481 U.S., at 745, and it is a sound one.

While the rule received its definitive articulation in *Salerno*, it is grounded in constitutional and prudential limitations on the power of federal courts that have been recognized and respected by decisions of the Court as far back as *Marbury v. Madison*. Federal courts are not "roving commissions assigned to pass judgment on the validity of the Nation's laws," *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973); they are instead tasked with "resolving concrete disputes brought before the courts for decision," and must simply decline to apply a statute "when such an application of the statute would conflict with the Constitution." *Younger v. Harris*, 401 U.S. 37, 52 (1971). Only when every application would conflict with the Constitution, therefore, should federal courts find a statute wholly invalid.

In addition to these important institutional limitations on federal court power, vital principles of federalism counsel further caution and restraint when federal courts are asked to review the constitutionality of legislation enacted by a state legislature. In such cases, application of the *Salerno* rule discouraging facial invalidation creates salutary opportunities for state courts "to construe a law to avoid constitutional infirmities." *New York v. Ferber*, 458 U.S. 747, 768 (1982).

There is no good reason not to apply *Salerno*'s rule to facial challenges to legislation regulating abortion-related conduct, and in fact the Court has explicitly applied the rule to such challenges on more than one occasion. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Akron II*, 497 U.S., at 514. It should do so again here.

The court of appeals's failure to apply the *Salerno* rule to this facial challenge to New Hampshire's Parental Notification Prior to Abortion Act resulted in an unjustified invalidation of the Act, in its entirety, "based upon a worst-case analysis that may never occur." *Akron II*, 497 U.S., at 514. Rather than asking whether the New Hampshire statute's notification requirements could ever be constitutionally applied—undoubtedly they could—the court of appeals focused on a few hypothetical situations in which, in its judgment, the requirements—and in particular an *exception* to those requirements—might place a minor's life or health at risk. The court of appeals erred in doing so.

Even had its method of hypothetical analysis been sound, however, the court of appeals reached the wrong conclusions with respect to New Hampshire's statute. That statute, with or without an explicit health exception, is not facially an *obstacle* to any woman's choice; instead, it is designed to provide *aid* for the decision-making process of pregnant minors—and their physicians—facing a difficult choice. In fact, in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), the Court upheld against constitutional challenge a parental-notification statute containing the same language that the court of appeals believed defective here. And *Stenberg v. Carhart*, 530 U.S. 914 (2000), does not require a different result. The Court's determination in that case that a statute prohibiting a particular abortion choice must provide certain exceptions should not be construed to control the statute at issue here, which operates to enhance and protect the decision-making process of young women who may not have the maturity or capacity to make an informed choice on their own.

Finally, the New Hampshire statute's judicial-bypass alternative should have alleviated any of the court of appeals's concerns that, in the rarest of cases, the statute's typical 48-hour delay could place a minor's life or health at risk. The statute provides for a bypass mechanism that is available 24-hours-a-day,

7-days-a-week, and requires judges to make their decisions "without delay" in order to protect "the best interest of the pregnant minor." N.H. REV. STAT. ANN. §132:26(II)(b)-(c). The State of New Hampshire is entitled to a presumption that its judges will follow their mandate under the statute, and do what is necessary to ensure that no minor comes to harm through any application of the State's Parental Notification Prior to Abortion Act. That should be more than enough to uphold the statute against facial challenge.

ARGUMENT

I. FACIAL CHALLENGES TO STATE STATUTES REGULATING ABORTION-RELATED CONDUCT SHOULD BE SUBJECT TO *SALERNO*'S "NO SET OF CIRCUMSTANCES" RULE.

A. The *Salerno* Rule Has Long Been a Fixture of the Court's Jurisprudence.

In the 1987 case of *United States v. Salerno*, the Court described the high burden carried by a plaintiff seeking to overturn a validly-enacted statute as unconstitutional on its face: "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S., at 745.

Due to its clear articulation in that case, the rule has since come to be identified with *Salerno*, and is frequently referred to as the "no set of circumstances" test. But the rule did not first appear in the Court's jurisprudence in 1987; even at that time its application was longstanding. *See, e.g., Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (noting that a statute "may be considered invalid 'on its face' . . . [if] it is unconstitutional in every conceivable application"); *Sec'y of State of Maryland v. Munson Co.*, 467 U.S. 947, 965 n.13 (1984) (stating that a facially invalid statute "in all its applications

falls short of constitutional demands"); *New York v. Ferber*, 458 U.S. 747, 767-68 (1982) (noting that facial-invalidity analysis is problematic in part because it is "undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation") (citation omitted); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (stating that those challenging a statute on its face must show that it is "invalid in toto—and therefore incapable of any valid application") (citation omitted); *Steffel v. Thompson*, 415 U.S. 452, 474 (1974) (same); *Broadrick*, 413 U.S., at 610 (noting that the challengers sought for the statute to "be struck down on its face and held to be incapable of any constitutional application"); *Younger*, 401 U.S., at 53-54 (suggesting that facial invalidation is inappropriate unless the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it") (citation omitted); *Watson v. Buck*, 313 U.S. 387, 402 (1941) (same).

And since *Salerno*'s articulation of the "no set of circumstances" test, the Court has cited and applied the rule many times. *See, e.g., Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (citing the *Salerno* rule); *Reno v. Flores*, 507 U.S. 292, 301 (1993) (noting that the *Salerno* rule applied to both the constitutional and statutory facial challenges before the Court); *Rust*, 500 U.S., at 183 (applying the *Salerno* rule to the facial challenge of an abortion-related regulation); *Akron II*, 497 U.S., at 514 (same); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (noting that facial challenges are based on the claim that a statute is unconstitutional in all of its applications); *see also Webster v. Reprod. Health Servs.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in judgment)

(applying *Salerno* to the facial challenge of an abortion-related regulation).

One Justice has offered a simple and compelling justification for this great weight of authority supporting the "no set of circumstances" test for facial challenges to validly-enacted legislation: "before declaring a statute to be void in all its applications . . . , we have at least imposed upon the litigant the eminently reasonable requirement that he establish that the statute was *unconstitutional* in all its applications." *City of Chicago v. Morales*, 527 U.S. 41, 77-78 (1999) (Scalia, J., dissenting). Respondents here have asked the federal courts to find New Hampshire's parental-notification statute unconstitutional in every conceivable application; it is thus eminently reasonable for the federal courts to require Respondents to show that New Hampshire's validly-enacted statute is in fact unconstitutional in every conceivable application.

B. The "Large Fraction" Test Has Not Commanded a Majority of the Court.

Notwithstanding the weight of authority supporting application of the "no set of circumstances" test to facial challenges to validly-enacted State statutes, the court of appeals held that it could strike down New Hampshire's parental-notification statute as unconstitutional on its face—and therefore as unconstitutional in every conceivable application—if the court determined that the statute was unconstitutional in only a "large fraction" of the most relevant anticipated applications. *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 57-58 (CA1 2004).

The court of appeals grounded its holding on language from the three-Justice joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*: "[t]he unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which [the statutory provision at issue] is

relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid."[3] 505 U.S. 833, 895 (1992); *see Heed*, 390 F.3d, at 57.

The court of appeals understood this language to stand for the proposition that Pennsylvania's spousal-notification requirement could be invalidated on its face—in every conceivable application—if it constituted an "undue burden" on a woman's decision to undergo an abortion in only a "large fraction" of the cases in which the requirement would be relevant. *See Heed*, 390 F.3d, at 57; *Casey*, 505 U.S., at 895. Read thusly, the court of appeals deemed *Casey*'s undue-burden standard in tension with the *Salerno* principle that a statute should be invalidated on its face only when it constitutes an unconstitutional burden in *every* case in which its requirements are relevant. *See Salerno*, 481 U.S., at 745.

It is significant, however, that the definition of an "undue burden" provided by the same three-Justice joint opinion—and later adopted by the Court in *Stenberg*, 530 U.S., at 921—makes no necessary connection between that substantive constitutional standard (undue burden) and the particular showing that must be made by plaintiffs seeking to facially invalidate state statutes under that standard. *See Casey*, 505 U.S., at 877 ("A finding of an undue

3. The court of appeals's reliance on this sentence from *Casey* in striking down New Hampshire's parental-notification statute is not without irony, considering that the very next sentence of the *Casey* joint opinion observes,

> [t]his conclusion is *in no way inconsistent with our decisions upholding parental notification or consent requirements*. Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. 505 U.S., at 895 (joint opinion) (citation omitted) (emphasis added).

burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."); *Stenberg*, 530 U.S., at 921. Indeed, in her concurring opinion in *Webster*, Justice O'Connor cited and applied *Salerno*'s "no set of circumstances" rule for facial challenges to state legislation, 492 U.S., at 524 ("some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional"), and simultaneously reaffirmed her commitment to measuring abortion-related regulations by the substantive undue-burden standard, *id.*, at 530—clearly suggesting the two can be read consistently.

Salerno's "no set of circumstances" rule is thus not, as the court of appeals indicated, *Heed*, 390 F.3d, at 57, in "tension with" the undue-burden standard of *Casey* and *Stenberg*. The question is simply whether plaintiffs seeking to facially invalidate a state statute on undue-burden grounds need to show that the statute constitutes an undue burden on a woman's abortion decision in *all* of its possible applications, or merely in some large fraction of them. *See, e.g. Manning v. Hunt*, 119 F.3d 254, 269 (CA4 1997) ("[I]n order to succeed, Appellants are required to show that under no set of circumstances can the Act be applied in a manner which is not an undue burden . . . ."). Although the *Salerno* rule has been affirmed by the Court on numerous occasions, the "large fraction" language found in *Casey*'s three-Justice joint opinion has never commanded a majority of the Court. It should not do so here.

C. The Court Has Applied the *Salerno* Rule in Facial Challenges to Abortion-Related Regulations.

The court of appeals thought it significant that in *Stenberg* a majority of the Court affirmed the continuing vitality of the substantive undue-burden standard for abortion-related regulations

set out by the joint opinion in *Casey*. *Heed*, 390 F.3d, at 57; *see also Stenberg*, 530 U.S., at 921. The "large fraction" language of the *Casey* joint opinion, however, is nowhere to be found in the majority opinion in *Stenberg*. *See Stenberg*, 530 U.S., at 920-46. The Court in *Stenberg* did not hold that a statute regulating abortion-related conduct may be found unconstitutional in all of its possible applications upon a showing that it is unconstitutional in a "large fraction" of its potential applications; indeed, the Court in that case did not address at all the standard of review governing facial challenges to abortion-related legislation.

But the Court has previously addressed this very issue. On at least two occasions, the Court has explicitly applied *Salerno*'s "no set of circumstances" rule in facial challenges to abortion-related regulations. In *Rust*, 500 U.S., at 177-78, the Court took up a facial challenge to federal regulations "which limit the ability of Title X fund recipients to engage in abortion-related activities." The Court began its analysis by pointing out that

> Petitioners are challenging the *facial* validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations . . . can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights. Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. *Id.*, at 183.

An extensive quote from *Salerno* followed. *Id.*

Even more pertinent to the case at hand is the Court's opinion in *Akron II*, 497 U.S., at 506, which concerned a facial challenge to an Ohio statute much like the New Hampshire law at issue here "that, with certain exceptions, prohibits any person from performing an abortion on an unmarried, unemancipated, minor woman absent notice to one of the woman's parents or a court order of approval."

Citing Justice O'Connor's concurrence in *Webster*, 492 U.S., at 524, the Court confirmed that, "because appellees are making a facial challenge to a statute, *they must show that 'no set of circumstances exist under which the Act would be valid.'*" *Akron II*, 497 U.S., at 514 (emphasis added). The Court then explicitly criticized the court of appeals for invalidating Ohio's parental-notification statute "on a facial challenge based upon a worst-case analysis that may never occur." *Id.*

The Court's admonishment in *Akron II* may be applied with equal force to the court of appeals's judgment here. For the court of appeals's decision to strike down New Hampshire's entire statutory notification scheme might fairly be said to rest on the hypothetical possibility that, at some point in time: 1) a minor who desires to have an abortion; 2) will be determined by a doctor to require that abortion in less than 48 hours; 3) that abortion will be necessitated by a medical emergency that does not threaten her life; 4) there will be no way to receive timely confirmation that a parent has been notified; *and* 5) a judge will refuse to determine with sufficient alacrity that such an abortion is in the minor's best interests, notwithstanding his statutory obligation to rule "without delay." *See* N.H. REV. STAT. ANN. §§132:24 to :28; *Heed*, 390 F.3d, at 61-64.

Whether, in that worst-case scenario, New Hampshire's notification requirements might constitute an undue burden on a hypothetical minor's decision to have abortion may be a close academic question. But with respect to the parties before this Court, it can be no more, for "[t]he delicate power of pronouncing [legislation] unconstitutional is not be exercised with reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960).

D. State Laws Regulating Abortion-Related Conduct Are Entitled to the Same Deference Accorded to State Laws Regulating Other Potentially Protected Conduct.

There are good reasons to reaffirm the Court's application of *Salerno* in the context of facial challenges to statutes regulating abortion-related conduct. *See Rust*, 500 U.S., at 183; *Akron II*, 497 U.S., at 514. The Court's established reluctance to determine a statute's facial validity by reference to "a worst-case analysis that may never occur," *Akron II*, 497 U.S., at 514, is grounded largely in the truism that our Constitution limits the jurisdiction of federal courts to actual cases and controversies, *see Ferber*, 458 U.S., at 767 n.20; U.S. CONST. art. III, §2.

As the Court explained in its landmark decision in *Younger v. Harris*:

> Procedures for testing the constitutionality of a statute 'on its face' in the manner apparently contemplated by [*Dombrowski v. Pfister*, 380 U.S. 479 (1965)], and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass

> judgment on laws before the courts are called upon to enforce them. Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation it has been clear that, even when suits of this kind involve a 'case or controversy' sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. 401 U.S., at 52.

In other words, "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S., at 610-11.

These institutional limitations on federal courts are as relevant to this constitutional challenge to New Hampshire's parental-notification requirements as they were to the challenges to California's Criminal Syndicalism Act in *Younger*, 401 U.S., at 38, or to Oklahoma's restriction on political activity by state employees in *Broadrick*, 413 U.S., at 602.

And these constitutional and prudential limitations on the power of federal courts to declare laws facially invalid are buttressed by important principles of federalism when the statute challenged in federal court has been validly enacted by a state legislature. In these situations, "focusing on the factual situation before" the Court, and rejecting a hypothetical worst-case-scenario analysis, "fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities." *Ferber*, 458 U.S., at 768; *see also Munson*, 467 U.S., at 976-78 (Rehnquist, J., dissenting) (explaining that analysis based upon the statutory application actually before the court "is less intrusive on the legislative prerogative and less disruptive of state

policy" and "allows state courts the opportunity to construe a law to avoid constitutional infirmities"); *Stenberg*, 530 U.S., at 979 (Kennedy, J., dissenting) (noting that the federal district court's pre-enforcement injunction of the challenged State law "denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute"). In short, "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

The *amici* States urge the Court to acknowledge and affirm the Fourth Circuit's "observation that the logic of the *Salerno* test is necessary to show deference to legislatures, particularly in light of the limitation imposed by Article III of the Constitution that the judiciary act only in cases and controversies." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 165 (CA4 2000); *see also* U.S. CONST. art. III, §2. And the judicious deference undergirding the *Salerno* test—inherent in the simple rule that a state statute will not be held unconstitutional in every conceivable application unless and until it has been shown to be unconstitutional in every conceivable application—is no less appropriate for challenges to state laws regulating abortion-related conduct than for challenges to state laws regulating other forms of potentially protected conduct. *See, e.g.*, *Younger*, 401 U.S., at 38 (challenge to California's Criminal Syndicalism Act); *Broadrick*, 413 U.S., at 602 (challenge to Oklahoma's restriction on political activity by state employees).

As the *Casey* joint opinion observed, at stake in challenges to abortion-related statutes "is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." 505 U.S., at 877. The States have an unquestioned authority to regulate certain abortion-related conduct, *see id.*, and the Court should ensure that their attempts to do so are reviewed by the

federal courts with an appropriate caution and restraint, *see Erznoznik*, 422 U.S., at 216.

E. The Court Has Properly Limited "Overbreadth" Analysis to Speech-Related Claims Under the First Amendment.

Closely related to *Salerno*'s rule that a statute will be facially invalidated only when it has been shown to be unconstitutional in all of its applications, not merely some of them, *see* 481 U.S., at 745, is the traditional rule that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court," *Ferber*, 458 U.S., at 767; *see also Raines*, 362 U.S., at 21.

The Court has recognized a limited exception to this latter rule; an exception that has "come to be known as the First Amendment overbreadth doctrine." *Ferber*, 458 U.S., at 768. This exception, by which a person whose expressive conduct is unprotected may nevertheless challenge the statute at issue as overly broad, *see id.*, is "predicated on the sensitive nature of protected expression," *id.*, and can be justified only by "weighty countervailing policies," *id.* (citation omitted). The First Amendment overbreadth doctrine is "strong medicine" that the Court has employed "only as a last resort." *Broadrick*, 413 U.S., at 613. And, as its name suggests, the Court has limited the doctrine to challenges brought under the First Amendment. *See, e.g., Salerno*, 481 U.S., at 745 ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) ("[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad.").

Some academic commentators have argued that the Court should expand the overbreadth doctrine to make its exception available to those challenging state statutes regulating abortion-

related conduct. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 269-71 (1994). The *amici* States urge the Court not to do so. The First Amendment overbreadth doctrine is in some tension with the constitutional and prudential limitations on the federal judiciary's power discussed in the section above, and its exception to the traditional rule should be justified only in the context of protecting the freedom of expression, of which "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937).

Indeed, in *Roe v. Wade* itself, the Court took care to distinguish the liberty interests at issue, suggesting that overbreadth analysis is not appropriate in the abortion-regulation context: "[w]e are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under . . . *Younger v. Harris*, 401 U.S., at 50." *Roe*, 410 U.S. 113, 166 (1973). And, since *Roe*, the Court has rejected even that opinion's strict scrutiny as undervaluing the States' legitimate interests in regulating abortion-related conduct. *See Casey*, 505 U.S., at 875-77 (joint opinion). In recognition of those legitimate interests, and of the important differences between the right to speak and the right to choose an abortion, the Court should make clear that the First Amendment overbreadth doctrine does not apply to challenges to state statutes regulating abortion-related conduct.

II. NEW HAMPSHIRE'S PARENTAL-NOTIFICATION STATUTE IS NOT FACIALLY INVALID.

The joint opinion in *Casey* acknowledged that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S., at 877. New Hampshire's parental-notification

requirements do not present a substantial obstacle to any woman's exercise of the right to choose an abortion—and they certainly have not been shown to threaten any rights of the actual Respondents before the Court here, *see, e.g., Ferber*, 458 U.S., at 768; those notification requirements are thus entirely permissible.

The requirement that a parent or guardian receive notification before an unemancipated minor undergoes an abortion, *see* N.H. REV. STAT. ANN. §132:25, is not constitutionally controversial. The Court has considered and upheld similar parental-notification statutes on several occasions. *See Lambert v. Wicklund*, 520 U.S. 292 (1997); *Hodgson v. Minnesota*, 497 U.S. 417, 497 (1990); *Akron II*, 497 U.S., at 514; *H.L. v. Matheson*, 450 U.S. 398 (1981). Neither does the New Hampshire statute's typical 48-hour delay give rise to constitutional concerns. *See* N.H. REV. STAT. ANN. §132:25; *Hodgson*, 497 U.S., at 448 (opinion of Stevens, J.) ("The 48-hour delay imposes only a minimal burden on the right of the minor to decide whether or not to terminate her pregnancy."); *Akron II*, 497 U.S., at 514 ("[T]he mere possibility that the procedure may require up to 22 days in a rare case is plainly insufficient to invalidate the statute on its face.").

Nevertheless, the court of appeals held New Hampshire's Parental Notification Prior to Abortion Act invalid—in its entirety, on its face—because of a perceived constitutional defect in an explicit *exception* to its requirements: "[n]o notice shall be required . . . [if t]he attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice . . . ." N.H. REV. STAT. ANN. §132:26(I)(a); *see Heed*, 390 F.3d, at 59-64. The court of appeals concluded that this "death exception" was constitutionally inadequate under *Stenberg*, 530 U.S., at 930-38. *See Heed*, 390 F.3d, at 60.

That conclusion was incorrect, for at least four reasons: 1) New Hampshire's statute poses no substantial obstacle to pregnant minors' abortion choices; 2) the Court upheld a parental-notification statute containing the same exception in *Hodgson*, 497 U.S., at 497; 3) the exception is not constitutionally infirm under *Stenberg*, 530 U.S., at 930; and 4) even if the exception were in doubt under *Stenberg*, any such infirmity would be remedied by the statute's judicial-bypass provisions.

A. New Hampshire's Notification Statute Is Not an Obstacle to Choice: It Provides Aid to Minors Facing a Difficult Choice.

Through its Parental Notification Prior to Abortion Act, New Hampshire, like forty-two of its sister States, has created a structural mechanism by which the parent or guardian of a minor facing an abortion decision may give that "lonely or even terrified minor advice that is both compassionate and mature." *Akron II*, 497 U.S., at 520 (opinion of Kennedy, J.); *see* N.H. REV. STAT. ANN. §§132:24 to :28. New Hampshire's mechanism is less restrictive than that of many States; of the forty-three States that have passed analogous legislation, twenty-four have chosen to require parental *consent* before a minor many obtain an abortion.[4] New Hampshire's statute, in contrast, places it among the nineteen

4. *See* ALA. CODE §26-21-3; ALASKA STAT. §18-16-060; ARIZ. REV. STAT. §36-2152; CAL. HEALTH & SAFETY CODE §123450; IDAHO CODE §18-609A; IND. CODE §16-34-2-4; KY. REV. STAT. ANN. §311.732; LA. REV. STAT. ANN. §40:1299.35.5; ME. REV. STAT. ANN. tit. 22, §1597-A; MASS. GEN. LAWS ch. 112, §12S; MICH. COMP. LAWS §722.903; MISS. CODE ANN. §41-41-53; MO. REV. STAT. §188.028; N.C. GEN. STAT. §90-21.7; N.D. CENT. CODE §14-02.1-03.1; OHIO REV. CODE ANN. §2919.121; 18 PA. CONS. STAT. §3206; R.I. GEN. LAWS §23-4.7-6; S.C. CODE ANN. §44-41-31; TENN. CODE ANN. §37-10-303; TEX. OCC. CODE §164.052(a)(18) (effective Sept. 1, 2005); VA. CODE ANN. §16.1-241; WIS. STAT. §48.375; WYO. STAT. ANN. §35-6-118.

States requiring only parental notification.[5] *See Akron II*, 497 U.S., at 511 (observing that notice requirements are less intrusive than consent requirements and give no one a veto power over a minor's abortion decision).

And, in addition to advancing the State's legitimate interests in expressing profound respect for the life of the unborn, *see Casey*, 505 U.S., at 877 (joint opinion), New Hampshire's notification requirements also directly embody the State's acknowledgment of and response to "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) ("*Bellotti II*"). New Hampshire has placed no obstacles in the path of a woman's informed choice; it has simply taken steps to ensure that a minor who may not have the maturity or capacity for an informed choice has a reasonable opportunity to receive guidance and understanding in making her choice from a parent who has her best interests at heart. *See Casey*, 505 U.S., at 895 (joint opinion); *Akron II*, 497 U.S., at 520 (opinion of Kennedy, J.).

B. The Court Upheld a Substantially Similar Notification Statute in *Hodgson*.

The court of appeals's *facial* analysis of the New Hampshire parental-notification statute's "death exception" should have ended with the observation that, in 1990, the Court upheld a Minnesota

5. *See* ARK. CODE ANN. §20-16-805; COLO. REV. STAT. §12-37.5-104; DEL. CODE ANN. tit. 24, §1783; FLA. STAT. ANN. §390.01114; GA. CODE ANN. §15-11-112; 750 ILL. COMP. STAT. 70/15; IOWA CODE §135L.3; KAN. STAT. ANN. §65-6705; MD. CODE ANN., HEALTH GEN. §20-103; MINN. STAT. §144.343; MONT. CODE ANN. §50-20-204; NEB. REV. STAT. §71-6902; NEV. REV. STAT. §442.255; N.H. REV. STAT. ANN. §132:25; N.J. STAT. ANN. §9:17A-1.4; OKLA. STAT. tit. 63, §1-740.2; S.D. CODIFIED LAWS §34-23A-7; UTAH CODE ANN. §76-7-304; W. VA. CODE §16-2F-3.

parental-notification statute with an altogether indistinguishable exception. *See Hodgson*, 497 U.S., at 422, 426 & n.7; *id.*, at 493 (Kennedy, J., concurring in the judgment in part and dissenting in part). In terms virtually identical to those used in the New Hampshire law, Minnesota's statute provided—and, after the Court's review, still provides—that "[n]o notice shall be required under this section if: (a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; . . . ." MINN. STAT. §144.343(4); *Hodgson*, 497 U.S., at 426 n.7.[6] The court of appeals dismissed the Court's judgment in *Hodgson*, however, reasoning that the "Court did not consider a challenge to [the Minnesota] statute's lack of a health exception." *Heed*, 390 F.3d, at 60.

It is true that there is little discussion of any need for a health exception in *Hodgson*; in that case the Court held that a provision

6. Arkansas's parental-notification statute contains a virtually identical exception to that found in the Minnesota and New Hampshire notification statutes. *Compare* ARK. CODE ANN. §20-16-805(1) *with* MINN. STAT. §144.343(4) *and* N.H. REV. STAT. ANN. §132:26(I)(a). North Dakota's parental-*consent* statute similarly provides for an exception where "necessary to preserve [the minor's] life," but does not otherwise mention the minor's health. N.D. CENT. CODE §14-02.1-03.1(12). Wyoming's parental-consent statute takes a similar approach. WYO. STAT. ANN. §35-6-118(c) (providing exception where "necessary to preserve the minor from an imminent peril that substantially endangers her life"). The parental-consent statutes of Maine and Missouri likewise do not explicitly provide for health-related exceptions. *See* ME. REV. STAT. ANN. tit. 22, §1597-A; MO. REV. STAT. §188.028. All of these statutes do, however, provide a judicial bypass alternative to their respective notification or consent requirements. *See* ARK. CODE ANN. §20-16-804; ME. REV. STAT. ANN. tit. 22, §1597-A; MINN. STAT. §144.343(6); MO. REV. STAT. §188.028; N.D. CENT. CODE §14-02.1-03.1(2); WYO. STAT. ANN. §35-6-118.

requiring two-parent notification would have been unconstitutional standing alone, but that any constitutional infirmity was remedied by the statute's provision for a judicial bypass when notification would not be in the minor's best interests. *Hodgson*, 497 U.S., at 423; *id.*, at 493 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Nevertheless, the court of appeals's easy dismissal of *Hodgson* gives the decision insufficient respect. Those challenging Minnesota's statute expressly complained about the "death exception" in their brief to the Court. Brief for Cross-Respondents, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (No. 88-1125, 88-1309), 1989 WL 1127353, at *15 n.29 ("This exception does not help minors whose health problems warrant immediate abortions but whose lives cannot be certified to be so imminently endangered."). And although the Court may not have been principally focused on that particular provision of the Minnesota statute, the exception was explicitly referenced or quoted no fewer than four times in *Hodgson*—three times in Justice Stevens' opinion for the Court, and once in Justice Kennedy's concurrence. *See Hodgson*, 497 U.S., at 422, 426 & n.7; *id.*, at 493 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Moreover, the court of appeals did not hold that the New Hampshire statute's "death exception" is unconstitutional as applied to a particular factual situation; it held the provision unconstitutional *on its face*. The court of appeals was thus forced to assume that the Court in *Hodgson* upheld Minnesota's parental-notification statute against all constitutional challenges while, in the process of so doing, explicitly and repeatedly referencing a provision that rendered the statute *patently* unconstitutional. That

assumption was not justified. The Court's decision in *Hodgson* compels reversal of the court of appeals's judgment here.[7]

C. *Stenberg* Does Not Require a Different Result.

Rather than looking to *Hodgson* or other of the Court's parental-notification cases for relevant precedent, the court of appeals looked to *Stenberg*, in which the Court held that Nebraska's ban on partial-birth abortions required an exception "for the preservation of the life or health of the mother." *Stenberg*, 530 U.S., at 931 (citation omitted); *see Heed*, 390 F.3d, at 60, 62.

Contrary to the court of appeals's conclusion, however, the Court in *Stenberg* did not create a new, *per se* requirement that every regulation touching abortion-related conduct contain both life and health exceptions. Instead, the Court there held that such exceptions are required "where substantial medical authority supports the proposition that *banning a particular abortion procedure* could endanger women's health . . . ." *Stenberg*, 530 U.S., at 938 (emphasis added).[8]

New Hampshire has not banned any particular abortion procedure; it has simply required notification of an unemancipated

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7. New Hampshire's parental-notification statute was passed in 2003. *See* N.H. REV. STAT. ANN. §132:24 to :28. Given the similarities between the Minnesota and New Hampshire statutes, it is likely the case that, in an effort to draft a constitutional notification law, the New Hampshire legislators borrowed heavily from one that had been considered and upheld by the Court. New Hampshire's efforts to follow this Court's guidance in crafting constitutional legislation should not be rewarded with a summary, pre-enforcement invalidation of its statute.

8. The court of appeals's *per se* health exception requirement could also threaten, among other regulations, state statutes permitting health-care professionals to refuse on religious or moral grounds to participate in abortion procedures. *See* N.M. STAT. ANN. §30-5-2; S.C. CODE ANN. §44-41-50; WYO. STAT. ANN. §35-6-105.

minor's parent before that minor undergoes the abortion procedure of her choice. *See* N.H. REV. STAT. ANN. §132:24 to :28. And the interests served by New Hampshire's notification requirements—including, in particular, the interest the Court has recognized in "providing an opportunity for parents to supply essential medical and other information to a physician," *Matheson*, 450 U.S., at 411—are, if anything, even more compelling if the minor's health is at risk. *See, e.g., Bellotti II*, 443 U.S., at 651 n.31 ("The propriety of parental involvement in a minor's abortion decision does not diminish as . . . legitimate concerns for the pregnant minor's health increase.").

Although state legislatures may choose to forgo requiring parental notification when a doctor determines that a minor needs an abortion for health reasons, nothing in *Roe*, *Casey*, *Stenberg*, or the Constitution itself prohibits States from requiring parental notification in that circumstance. The Constitution is not offended by a state requirement that doctors notify a minor's parent upon determining that the minor's health is at risk. *See, e.g., Akron II*, 497 U.S., at 518-19 ("We continue to believe that a State may require the physician himself or herself to take reasonable steps to notify a minor's parent because the parent often will provide important medical data to the physician.").

D. The Statute's Judicial-Bypass Provision Ensures That No Minor's Life or Health Will Be Endangered by the Notification Requirements.

Even if the New Hampshire statute's "death exception" were infirm under *Stenberg*, the statute as a whole would nevertheless be constitutional due to its provision for judicial bypass. *See* N.H. REV. STAT. ANN. §132:26(II). The Court "has explicitly approved judicial bypass as a means of tailoring a parental *consent* provision so as to avoid unduly burdening the minor's limited right to obtain an abortion." *Hodgson*, 497 U.S., at 461 (O'Connor, J., concurring

in part and concurring in the judgment in part) (emphasis added); *see also Bellotti II*, 443 U.S., at 642-44; *id.*, at 651 n.31 ("[T]he opportunity for direct access to court . . . is adequate to safeguard throughout pregnancy the constitutionally protected interests of a minor in the abortion decision."). Judicial-bypass provisions are no less salutary in the parental-notification context. *See Akron II*, 497 U.S., at 511; *Hodgson*, 497 U.S., at 497.

In *Hodgson*, the Court deemed Minnesota's requirement that both parents receive notification prior to a minor's abortion to be unconstitutional on the ground that it was not reasonably related to any legitimate state interest. 497 U.S., at 449. The Court nevertheless held the requirement constitutional when combined with a judicial-bypass alternative. *Id.*, at 461 (O'Connor, J., concurring in part and concurring in the judgment in part); *id.*, at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part). The same should be true here. To the extent that, "in some cases, the [exception] would not work to the benefit of minors," the New Hampshire statute's judicial-bypass mechanism will "identify, and exempt from the strictures of the law, those cases . . . ." *Id.*, at 497 (Kennedy, J., concurring in the judgment in part and dissenting in part).

1. The judicial-bypass provision remedies the court of appeals's hypothetical health-related concerns.

The court of appeals recognized that a judicial-bypass provision could "stand in for" other constitutional requirements, including—on the assumption that one was necessary—a health-related exception to parental notification. *See Heed*, 390 F.3d, at 62. It also acknowledged that the New Hampshire statute's bypass mechanism "provides minors 24-hour, 7-day access to the courts," and requires courts to "reach a decision promptly and without delay so as to serve the best interest of the pregnant minor." *See Heed*, 390 F.3d, at 55, 62; N.H. REV. STAT. ANN. §132:26(II)(b)-(c).

Nevertheless, it held that the possibility of delay in reaching a judicial decision could put some hypothetical minors' health at risk, thus rendering the bypass provision constitutionally inadequate. *See Heed*, 390 F.3d, at 62.

The court of appeals should have instead recognized that "a State may expect that its judges will follow mandated procedural requirements." *Akron II*, 497 U.S., at 515. The New Hampshire Legislature has mandated that its state judges, when asked to determine whether parental notification is necessary, reach their decisions "without delay" to ensure "the best interest of pregnant minor." N.H. REV. STAT. ANN. §132:26(II)(b). New Hampshire is thus entitled to the presumption that its judges will comply with the statute and act with the speed necessary to serve the best interests of pregnant minors seeking to avoid notifying their parents of their decision to have an abortion—particularly when that decision might impact the minor's health.

The court of appeals's speculation that the judicial-bypass mechanism might not be implemented so as to ensure the best interests of the pregnant minor—despite the statute's explicit requirement to the contrary—contravenes the longstanding principle that, "[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Akron II*, 497 U.S., at 514 (citation omitted). And, for that reason, state statutes should not be invalidated, in their entirety, "on a facial challenge based upon a worst-case analysis that may never occur." *Akron II*, 497 U.S., at 514.

2. The judicial-bypass provision remedies the court of appeals's hypothetical concerns related to the "death exception."

In addition to finding the New Hampshire statute's "death exception" inadequate for its failure to include an explicit exception for health, the court of appeals found that the exception for death

itself was "drawn too narrowly." *Heed*, 390 F.3d, at 64. The court of appeals concluded that the language "*necessary* to prevent the minor's death," N.H. REV. STAT. ANN. §132:26(I)(a) (emphasis added), "fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk," *Heed*, 390 F.3d, at 64, and that the statute's background 48-hour delay "forces physicians either to gamble with their patients' lives in hopes of complying with the notice requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice." *Id.*, at 63.

As an initial matter, it is not at all clear that the statute fails to protect the good-faith judgment of physicians. The statute's penalty provision states that "[p]erformance of an abortion in violation of this subdivision shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification." N.H. REV. STAT. ANN. §132:27. It further exempts from liability anyone who "has attempted with reasonable diligence to deliver notice, but has been unable to do so." *Id.* The "death exception," in turn, permits an abortion without notice whenever there is an appropriate certification of necessity in the minor's medical record. *Id.*, §132:26(I)(a). New Hampshire's Attorney General argued to the court of appeals that New Hampshire's state courts would read the statute to protect physicians' good-faith medical judgments. *See Heed*, 390 F.3d, at 63. That argument is supported by the approach this Court took to the Georgia statute at issue in *Doe v. Bolton*, 410 U.S. 179, 192 (1973) ("Whether, in the words of the Georgia statute, 'an abortion is necessary' is a professional judgment that the Georgia physician will be called upon to make routinely."). Rather than rejecting the possibility of a salutary construction outright, the court of appeals should have allowed a New Hampshire court "the opportunity to construe [the] law to avoid constitutional infirmities," *Ferber*, 458 U.S., at 768.

And further, the court of appeals's concern that certain, hypothetical physicians will be forced "to gamble with their patients' lives" under the "death exception" is unfounded. The physicians placed in an untenable position under the statute, according to the court of appeals, are those who both: 1) suspect that an abortion will be necessary to save the life of the pregnant minor; and 2) are not confident that the procedure absolutely must need to take place within 48 hours. *See Heed*, 390 F.3d, at 63. The statute, however, provides two clear additional options to such physicians—options ignored by the court of appeals. First, such physicians can seek assurance that those entitled to notice have actually been notified. *See* N.H. REV. STAT. ANN. §132:26(I)(b). A parent's written note makes the 48-hour waiting period unnecessary. *Id.* Second, such physicians can make use of the judicial-bypass alternative available 24-hours-a-day, 7-days-a-week. N.H. REV. STAT. ANN. §132:26(II)(c).

Whether or not the New Hampshire statute's "death exception" to its otherwise unquestionably permissible parental-notification requirements could have been drawn more broadly, the statute's provision of a judicial-bypass alternative makes it more than "fairly possible [to] construe [the] statute to avoid a danger of unconstitutionality." *Akron II*, 497 U.S., at 514 (citation omitted). And whether the exception could be unconstitutional as applied to some doctor, or some minor, somewhere, New Hampshire's entire statutory scheme should not be invalidated "on a facial challenge based upon a worst-case analysis that may never occur." *Akron II*, 497 U.S., at 514.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

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IN THE

Supreme Court of the United States

KELLY A. AYOTTE, Attorney General of the State of New Hampshire, in her Official Capacity,

Petitioner,

—v.—

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, CONCORD FEMINIST HEALTH CENTER, FEMINIST HEALTH CENTER OF PORTSMOUTH, and WAYNE GOLDNER, M.D.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Was the First Circuit Court of Appeals correct in holding that a law that requires minors to delay their abortions must contain a medical emergency exception for circumstances when the delay will undisputedly put minors' health in serious jeopardy?

2. Was the First Circuit Court of Appeals correct to strike New Hampshire's Parental Notification Prior to Abortion Act in its entirety where such relief is the only way to effectively remedy the constitutional violation without invading the province of the Legislature?

STATEMENT PURSUANT TO RULE 29.6

The disclosure required pursuant to Supreme Court Rule 29.6 is set forth in Respondents' Brief in Opposition to the Petition for Certiorari. There are no amendments.

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N.H. District Court, Domestic Violence Protocols, Ch. 3, Protocol 3.1, http://www.courts.state.nh.us/district/protocols/dv/index.htm (last visited Oct. 7, 2005) 17

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STATEMENT OF THE CASE

In 2003, the New Hampshire Legislature passed the Parental Notification Prior to Abortion Act (the "Act"). N.H. Rev. Stat. Ann. §§ 132:24-28 (2003) (Joint Appendix (hereinafter "J.A.") 15-20). On pain of criminal and civil penalties, the Act bans performance of an abortion for a minor unless the physician provides at least forty-eight hours advance notice to one of the minor's parents. Act § 132:25, I. The only circumstances in which the physician need not comply with this requirement are: 1) if the minor's parent has provided a written certification that he or she has been notified; 2) if the minor has gone to court and obtained a waiver of the notice requirement through the judicial bypass procedure; or 3) if the physician can "certif[y]" that an "abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." Act § 132:26. The Act provides no exception for medical emergencies in which delaying an abortion will cause serious medical damage short of imminent death.

The undisputed record in this case, however, establishes that some pregnant minors experience medical emergencies that will not cause imminent death but that nonetheless require immediate abortions to prevent severe and permanent harm to their health. Respondent Dr. Wayne Goldner – a New Hampshire obstetrician and gynecologist – submitted an uncontested declaration providing examples of such conditions.[1] As set forth in his declaration, those emergency

[1] Dr. Goldner is board certified by the American Board of Obstetricians and Gynecologists, a fellow in the American College of Obstetricians and Gynecologists, and a past chair of the Department of Obstetrics and Gynecology at Elliot Hospital, where he continues his hospital-based

conditions include preeclampsia, which is "a form of pregnancy-induced hypertension"; chorioamnionitis, which is "a serious infection of the placental lining"; other pelvic infections; and heavy bleeding from the uterus. Goldner ¶¶ 8-14 (J.A. 23-26). As Dr. Goldner further explained, in many such emergencies the "teen needs an immediate abortion to prevent serious harm to her health." *Id.* ¶ 7. Dr. Goldner's declaration provides a catalogue of the serious medical harm that minors face if they do not receive the immediate medical attention that is clinically indicated, including permanent damage to major organ systems, particularly the liver and kidneys; fluid in the lungs; the spread of infection throughout the body; loss of vision; permanent loss of fertility; and chronic pain. *Id.* ¶¶ 8-15. In short, these pregnant teens face the "real risk of a lifetime of . . . permanent, significant health problems" as a result of the delays inherent in complying with the Act. *Id.* ¶ 12.

In addition, the Act's death exception fails even to protect those minors in need of life-saving abortions, for reasons also set forth in Dr. Goldner's declaration. While the Act permits a physician to provide immediate care to a pregnant teenager who will otherwise die within forty-eight hours, "that is just not the way medicine works: Whether and when a patient will die

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practice. Dr. Goldner graduated from the University of Pennsylvania School of Medicine and is licensed to practice medicine by the State of New Hampshire. Goldner ¶ 1 (J.A. 21). Dr. Goldner provides his patients with the full range of reproductive health services, including prenatal care, delivery of newborns, infertility treatment, and screening and treatment for sexually transmitted infections. *Id.* ¶ 2. He also provides abortions for adults and for minors, some of whom do not involve a parent before seeking his care. *Id.* ¶¶ 2-4.

cannot be predicted with such accuracy." *Id.* ¶17; *see also id.* ¶ 19. Moreover, Dr. Goldner explained that, because the death exception does not clearly permit him to rely on his good faith medical judgment, it "forces doctors to think about criminal prosecution at a time when we need to be concentrating on doing what is best for our patients, thus creating unnecessary risk to patients' health and lives." *Id.* ¶ 19.

Summarizing the impact of the Act on his patients, Dr. Goldner stated: "I fear enforcement of the Act for my patients' sake as well as my own. . . . [It] places me in fear of prosecution for fulfilling my duty as a physician, which is to proceed with my patient's safety as my paramount concern." *Id.* ¶ 20. The State did not challenge *any* of the assertions contained in Dr. Goldner's declaration, either by way of argumentation or submission of factual evidence or expert opinion.

Based on this undisputed record, both courts below held the Act unconstitutional because its lack of a medical emergency exception endangers young women's health. App. to Pet. for Writ of Cert. (hereinafter "Pet. App.") 11-17, 24, 30-35. Both courts also held the Act unconstitutional on the additional ground that its death exception is inadequate to protect minors facing even life-threatening emergencies. *Id.* at 17-21, 35-36.

SUMMARY OF ARGUMENT

The central issue in this case is simple but profound: Can the state omit a medical emergency exception from an otherwise permissible abortion regulation, even when it is undisputed that compliance with the regulation in emergencies will result in serious medical harm? Again and again over the last thirty years, this Court has held that the Constitution bars so

endangering women's health; again and again in its brief, the State of New Hampshire asks this Court to hold that it does not. This Court should decline that invitation, affirm the Court of Appeals, and thereby reaffirm this Court's own longstanding precedent prohibiting states from jeopardizing women's health when they regulate abortion.

The Act makes it a crime for a doctor to provide an abortion to a minor until at least forty-eight hours after notifying a parent. As the State now admits, this prohibition applies even in those circumstances in which it is undisputed that the delay will cause serious and permanent damage to a woman's health, including damage to major organ systems, body-wide infection, infertility, and vision loss. Under this Court's precedent, that should end the matter.

But the State instead asks this Court to accept two radical and dangerous propositions. First, it urges this Court to abandon its steadfast protection for women's health and hold that a law that causes serious harm in medical emergencies needs no exception if the women it harms are minors and the law at issue is one requiring parental involvement. But invoking the interests underlying parental involvement laws cannot give the State license to endanger minors' health. Recognizing any such license would eviscerate the core constitutional principle repeatedly reaffirmed by this Court: Regardless of the state interest served, "the essential holding of *Roe* forbids a state to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992). Indeed, if this Court were to permit the interests put forth by New Hampshire to trump a

minor's interest in protecting her health, there would be little to stop states from requiring women of all ages to sacrifice their health in the name of advancing other governmental interests.

The State's second proposal – that teens in medical crises should wait to obtain treatment until they can secure a judicial bypass – is equally devastating to teens' health and therefore equally unconstitutional. In an emergency, a woman needs to go to the hospital not a courthouse. Requiring a minor to delay appropriate care until she can secure a court order – even when it is undisputed that in certain emergencies every minute the patient remains untreated puts her at risk of serious damage to her health – is not only unconstitutional, it is inhumane. The Act's indifference to young women's well-being is also manifest in the inadequacy of its death exception.

Once it has determined that the Act's lack of an emergency exception violates the Constitution, this Court must decide what relief will effectively and appropriately remedy the constitutional violation. Here, again, the State asks this Court to treat serious harm to minors' health as constitutionally irrelevant, and to abandon clear precedent mandating such relief as is necessary to remedy that harm. First, the State argues that the Court should grant no relief at all and instead should wait until presented with a "concrete case" of a teen in the midst of a medical crisis. But by that point, it is too late to prevent the harm and, thus, to remedy the violation.

The State's only other proposal is that the Court should grant "as-applied" relief by severing the unconstitutional applications and, in effect, writing a medical emergency exception into the Act. But allowing the judiciary to decide the parameters of the medical emergency exception and engraft it

on to the Act – where the New Hampshire Legislature purposefully chose not to include one – would undermine, not further, the institutional values underlying the principle articulated in *United States v. Salerno*, 481 U.S. 739 (1987), including limited judicial power, separation of powers, and federalism. Protection of those principles, and of women's health, requires this Court to facially invalidate the Act and thereby allow the Legislature, if it so chooses, to shape a parental notification law that abides by this Court's clearly articulated, longstanding precedent.[2]

ARGUMENT

I. WITHOUT A MEDICAL EMERGENCY EXCEPTION, THE ACT ENDANGERS MINORS AND VIOLATES THE CORE OF THE RIGHT PROTECTED IN *ROE* AND *CASEY*.

In an unbroken line of cases stretching back thirty years, this Court has left no doubt that the health of the pregnant woman is at the core of the right to reproductive privacy. This Court has steadfastly held that where the regulation of abortion threatens a woman's life *or health*, other state interests must yield to her medical well-being. The State and its *amici* now ask this Court to disregard those holdings and to sanction the Act's requirement that physicians delay a minor's abortion even in emergencies in which it is undisputed that such delay threatens the minor with serious medical harm. This Court should decline that invitation, and affirm. The medical well-

[2] If the Court rejects Respondents' medically-based claims, Respondents are entitled to remand of their claim that the judicial bypass does not adequately protect minors' confidentiality.

being of pregnant women has been an essential element of constitutional liberty for more than three decades and should not be sacrificed to a "jurisprudence of doubt." *Casey*, 505 U.S. at 844.

A. Laws that Delay Access to Abortion, Including Parental Involvement Laws, Must Contain a Medical Emergency Exception.

Starting with *Roe v. Wade*, this Court has repeatedly emphasized the state's obligation to protect pregnant women's health and has struck down any abortion regulation that failed to do so, regardless of the interests otherwise served by the regulation. Thus, in *Roe*, the Court recognized both a woman's constitutional right to end her pregnancy prior to fetal viability, 410 U.S. 113, 153, 163-63 (1973), and the state's authority to enact a post-viability abortion ban if, but only if, it contained an exception to protect women's health, *id.* at 164-65. Similarly, in *Thornburgh v. ACOG*, 476 U.S. 747 (1986), *overruled in part on other grounds by Casey*, 505 U.S. 833, this Court held that the "failure to provide a medical-emergency exception" was fatal to a requirement that a second physician be present for a post-viability abortion. *Id.* at 771. The exception was needed because "*delay* in the arrival of the second physician" would endanger the woman in an emergency. *Id.* at 770 (emphasis added). Even for post-viability abortions, therefore, where the state interest is at its most compelling, the government cannot regulate abortion in a way that "fail[s] to require that maternal health be the physician's paramount consideration." *Id.* at 768-69.

That is precisely the principle this Court affirmed and applied in *Casey*. As that case explicitly held, laws that require

parental involvement and that create delay must contain an exception for emergencies in which a prompt abortion is necessary to preserve a woman's health. 505 U.S. at 880. Under the Pennsylvania statute reviewed in *Casey*, all minors were required to obtain parental consent or a judicial waiver before obtaining an abortion and all women (including minors) were required to delay their abortions for twenty-four hours after receiving state-mandated information from their physicians. *Id.* at 844. Recognizing that adequate protection for women's health was a necessary precondition for the constitutional operation of these restrictions, the Court first analyzed the law's medical emergency exception. *Id.* at 879 ("Because it is central to the operation of the various other requirements, we begin with the statute's definition of medical emergency."). Unlike the Act at issue here, the Pennsylvania law included an emergency exception that covered not only women's lives, but their health as well. *Id.* The plaintiffs, however, claimed that the exception did not allow an immediate abortion in some situations in which delay threatened the woman's health. *Id.*

Addressing the plaintiffs' argument that the exception was so narrow that it "foreclose[d] the possibility of an immediate abortion despite some significant health risks," the Court unequivocally held: "If the contention were correct," the parental involvement and waiting period restrictions would violate "the essential holding of *Roe* [which] forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Id.* at 880. The *Casey* Court went on to uphold the parental involvement and delay requirements only because the emergency exception – as construed by the Court of

Appeals in that case – "assure[d] that . . . [the] abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Id.* (internal quotations and citation omitted).

Casey thus acknowledges that a state-mandated delay in receiving medical care imposes significant health risks for women in certain emergencies and reaffirms the principle that any regulation that imposes delay must include a medical emergency exception. Absent such an exception, it constitutes an undue burden.[3] *See id.* at 885.[4]

This Court most recently affirmed the constitutional import of women's health in *Stenberg v. Carhart*, 530 U.S. 914 (2000). *Stenberg* struck down a Nebraska law that prohibited certain abortions unless necessary to save a woman's life because the

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[3] Both New Hampshire and the United States attempt to sound alarm bells by claiming that Respondents' argument would somehow require emergency exceptions to record-keeping mandates. *See* Pet. Br. at 20; Brief for the United States as *Amicus Curiae* at 8. But their argument is specious. Respondents have never claimed that an abortion regulation must contain an emergency exception even if compliance would in no way delay an abortion or otherwise harm a woman's health.

[4] *Hodgson v. Minnesota*, 497 U.S. 417 (1990), is not to the contrary. As the State admits, the lack of a health exception was not raised as a ground for invalidation in that case. Pet. Br. at 15-16; *see also* Br. for the United States at 22. This Court has long adhered to the fundamental rule that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also Heck v. Humphrey*, 512 U.S. 477, 482 (1994) (explaining Court's prior decision on related issues not controlling where "that opinion had no cause to address, and did not carefully consider the . . . question before us today").

law "lack[ed] any exception for the preservation of the . . . health of the mother." *Id.* at 930 (internal quotations and citation omitted). As even two of the dissenting Justices agreed, under *Casey*, if a regulation creates "a 'significant threat to the life *or health* of the woman,' . . . its application would impose an undue burden." *Id.* at 967 (Kennedy, J., dissenting) (quoting *Casey*, 505 U.S. at 880) (emphasis added).

Applying this clear, consistent mandate, the courts below correctly held New Hampshire's Act impermissibly imposes delay even where delay imperils the minor's health.[5]

B. It Is Undisputed – and Indisputable – that Delay Imposes Significant Health Risks for Minors in Certain Emergencies.

To confirm that the Constitution requires a medical emergency exception in the Act, this Court need review no contested findings of fact, for there are none. The State did not – because it could not – dispute that in certain emergencies, an immediate abortion is necessary to avert the risk of severe and permanent damage to a minor's health. As Respondents' undisputed proofs demonstrate, "there are . . . conditions" in which a "teen needs an immediate abortion to prevent serious harm to her health." Goldner ¶ 7 (J.A. 23). For example, preeclampsia is "a form of pregnancy-induced hypertension, characterized by excessively high blood pressure" that puts a

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[5] The United States refutes a phantom claim in insisting that "there is no justification for requiring" a "general health exception, . . . as opposed to a narrower exception for medical emergencies." Br. for the United States at 23. Throughout this case, Respondents have claimed that the Act is unconstitutional because it imposes delay, and yet lacks what *Casey* requires: an exception for *emergencies* in which delay imposes serious health risks.

minor "at risk for liver or kidney dysfunction or failure; severe bleeding; vision loss; and fluid in the lungs." *Id.* ¶ 8. Because "delay may well cause substantial harm . . . , the best medical course will often be to end the pregnancy immediately." *Id.* ¶ 9. Premature rupture of the amniotic membranes prior to fetal viability is similarly dangerous. It puts the minor "at risk" of developing a serious infection of the placental lining, called chorioamnionitis." *Id.* ¶ 10. Chorioamnionitis puts the minor "at serious risk of severe and permanent harm to her health, including scarring of the reproductive organs which can cause total infertility, chronic pelvic pain, . . . [and] damag[e to] major organ systems, such as [her] kidneys or liver." *Id.* ¶¶ 10, 12. Moreover, "[t]he course of chorioamnionitis is unpredictable and it can spread quickly. Because every minute the woman remains infected, she is at risk of serious damage to her health, the best medical course is often to provide an immediate abortion." *Id.* ¶ 11; *see also id.* ¶ 13. In addition, "[a]n immediate abortion may also be needed when a woman experiences heavy bleeding from the uterus," which "places the teenager at risk of dangerously low blood pressure, permanent kidney and liver damage, and infertility. Such patients are also often at risk for infection, with all the dangers that entails." *Id.* ¶¶ 14-15; *see also* Brief of American College of Obstetricians and Gynecologists, *et al.* as *Amicus Curiae* (hereinafter Br. of ACOG).[6]

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[6] The State and its *amici* harp on the fact that relatively few minors will be harmed by the lack of a medical emergency exception. If the prospect that Dr. Goldner will see a minor who will be seriously harmed by the Act were truly as "hypothetical" as the State and its *amici* claim, he would lack injury in fact, and therefore, standing. But tellingly, the State has never sought to dismiss the action on standing grounds. And indeed, such a motion would surely fail, as Dr. Goldner's uncontested declaration establishes that

Far from opposing these proofs, the State acknowledges that an immediate abortion is required in certain emergencies to avert the risk of serious damage to minors' health, *see* Pet. App. 5 n.2, 33 n.4 (noting undisputed evidence) – which is, indeed, the only plausible approach for the State to take. As this Court found in *Casey*, it is "undisputed" that, absent an immediate abortion, some cases of preeclampsia and premature ruptured membranes, for example, "could lead to an illness with substantial and irreversible consequences." 505 U.S. at 880. As elaborated in the ruling of the Court of Appeals that *Casey* affirmed:

> There is no dispute . . . that preeclampsia, inevitable abortion, and prematurely ruptured membranes *can lead to* a substantial and

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the Act's lack of a medical emergency exception will interfere with his ability to treat his patients. *See, e.g.*, Goldner ¶ 20 (J.A. 29) ("[B]ecause the Act will prevent me from caring for my patients according to accepted medical practice and my best medical judgment, I fear enforcement of the Act for my patients' sake as well as my own. . . . The Act thus places me in fear of prosecution for fufilling my duty as a physician . . . ."); *id.* ¶¶ 11-18 (describing Act's effects on his ability to provide his patients with appropriate medical care).

Once it is recognized that Dr. Goldner has standing, the question of how many minors will be harmed by the Act is irrelevant to the constitutional question. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part) (explaining that if plaintiff has standing, "it does not matter how many persons have been injured by the challenged action"). Indeed, as this Court has held, the state cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it. *Stenberg*, 530 U.S. at 934; *see also Casey*, 505 U.S. at 879-80 (insisting that waiting period and parental consent law contain a medical emergency exception without regard to the number of women who would be harmed without an exception).

> irreversible impairment of a major bodily function . . . [This can include] irreversible damage to the liver, kidneys and more . . . . In the case of all three conditions . . . the treatment uniformly prescribed by the medical profession . . . was an *immediate* abortion. . . . Th[ere was] medical consensus that the risk occasioned is sufficiently serious to call for an *immediate* abortion . . . .

Planned Parenthood v. Casey, 947 F.2d 682, 700-01 (3d Cir. 1991) (all but first emphasis added), *aff'd*, 505 U.S. 833.[7]

Having conceded these same facts in this case, *see* Pet. App. 5 n.2, 33 n.4,[8] the State nonetheless insists that these grave

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[7] *See also Planned Parenthood v. Wasden*, 376 F.3d 908, 927 (9th Cir. 2004) (invalidating parental consent law for lack of adequate emergency exception, and noting that state's "experts did not . . . dispute any of the underlying medical facts, such as the . . . urgency of performing an abortion [for a minor] once the conditions are detected"), *cert. denied*, 125 S. Ct. 1694 (2005); *Planned Parenthood v. Owens*, 287 F.3d 910, 920 & n.8 (10th Cir. 2002) (invalidating parental notice law for lack of emergency exception because "there are a number of . . . pregnancy complications the parties agree could pose major risks to the health of the pregnant minor, treatment for which may require an abortion . . . and for which . . . any delay at all[] could endanger the health of the pregnant minor").

[8] The State has always argued this case purely as a matter of law. While it now simply asserts that the Constitution requires no medical emergency exception, in the lower courts, the State pressed its now-abandoned "argu[ment] that other provisions of New Hampshire law provided a functional equivalent." Pet. App. 14-15, 34 (rejecting argument); *see also United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 n.3 (1996) (holding that argument included in petition for *certiorari* but not in brief on the merits is abandoned). Hence, the State did "not dispute that

harms to minors' health are not constitutionally cognizable. The State's position is as callous as it is constitutionally unsound, and must be rejected.

C. Forcing a Minor in a Medical Emergency To Navigate the Judicial Bypass System Imposes Dangerous and Unconstitutional Delay.

Despite the undisputed serious risks of even brief delays in medical emergencies, the State insists that, in lieu of a medical emergency exception, minors in need of immediate abortions must postpone treatment while they navigate the Act's judicial bypass system. But even accepting that courts would endeavor to rule as quickly as possible, requiring minors to obtain a judicial bypass necessarily imposes delay, and therefore is no

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pregnant minors . . . could experience complications . . . that would endanger their health," requiring "immediate termination of the pregnancy." Pet. App. 33 n.4. Presumably because it viewed the case as raising only legal matters, the State "agreed that the [district] court may decide the plaintiffs' requests for . . . permanent injunctive relief . . . based on" the parties' initial filings, *id.* at 27, including Dr. Goldner's unopposed declaration.

As the State thus utterly failed to dispute Respondents' proofs, there is no merit to its eleventh-hour attempt to disparage the record. Only now, for example, in this Court, does the State complain that the record contains no evidence of harm to minors under Minnesota's law, which lacks an emergency exception. Pet. Br. at 6-7, 15-16. This absence, however represents no defect because the State has never contested that the Act will prevent Dr. Goldner from providing appropriate treatment to minors who suffer medical crises in New Hampshire. Likewise, the State now asserts that Respondents neither offered "substantial medical authority" to support the need for an emergency exception nor proved that the harm to minors' health would be "significant." *Id.* at 19. But this argument is nothing but a distraction because, in this case, it is *undisputed* that delay in certain emergencies causes *significant* harm.

substitute for what the Constitution mandates: an exception allowing an immediate abortion in medical emergencies. Indeed, the New Hampshire Supreme Court has recognized as much and has expressly rejected the notion that doctors must await a judicial finding of an emergency before providing medical care because "such a finding would clearly be impractical because of the urgent need for treatment in emergency situations." *Opinion of the Justices*, 465 A.2d 484, 490 (N.H. 1983).

The State attempts to get around this common-sense conclusion by acting as if the delay caused by the Act begins at the point at which a judge is located and presented with a bypass petition, but the delay really begins much earlier: at the time a doctor determines that a medical emergency exists and urgent treatment is required. Starting from that point, rather than proceeding with medically-indicated care, the minor or perhaps her doctor must begin to learn about the bypass process and find either a lawyer or an open courthouse. Then, someone – perhaps a lawyer – would have to compile the necessary information; draft any requisite papers; and find a judge to hear the case. While finding a judge may not be terribly time consuming if the emergency occurs during business hours, the process may come to a standstill if the court is closed. *See infra*. Once the petition is before the court, the judge would need to understand the facts of the case at least well enough to "make in writing specific factual findings and legal conclusions supporting the decision," Act § 132:26, II(b). All the while, the minor remains untreated and at risk.

Moreover, despite the State's argument that access to a judge could be almost immediate, Pet. Br. at 22, the evidence

is to the contrary. Although the Act states that access to the courts "shall be afforded . . . 24 hours a day, 7 days a week," Act § 132:26, II(c), New Hampshire courts are, in fact, open only on weekdays from 8:00 a.m. until 4:30 p.m. While there may indeed be judges willing to act expeditiously if called on to do so at 3:00 a.m. or on a Sunday, neither the Act nor the Court's website provides any information about how to find and access such a judge. *See* Judicial Branch, State of N.H., http://www.nh.gov/judiciary/courtlocations/index.htm (last visited October 5, 2005); *see also* Brief *Amici Curiae* for the Center for Adolescent Health and the Law, *et al.* Other courts have found such twenty-four hour provisions "meaningless" where local court rules only required the courts to be open during regular business hours. *See, e.g., Planned Parenthood v. Lawall*, 180 F.3d 1022, 1031 (9th Cir. 1999), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999).

Far from advancing its position, the State's citation of other contexts in which judges are available outside business hours demonstrates the flaw in its arguments. Unlike those other contexts – domestic violence incidents, search orders, child protection orders, Pet. Br. at 22 – here there is no state actor with the ability to, and responsibility for, locating a judge at night or on weekends. Indeed, the State's only citation to New Hampshire law – a domestic violence law – demonstrates the State's recognition of the problem facing private litigants and, indeed, even state officials who need to locate a judge to obtain an emergency order. That law requires peace officers to provide victims of domestic violence with "immediate and written notice" of their right to have the officer request "an emergency telephonic order for protection" from a judge. N.H. Rev. Stat. Ann. § 173:B-10. "Law enforcement is provided

with the home telephone numbers of judges." N.H. District Court, Domestic Violence Protocols, Ch. 3, Protocol 3.1, http://www.courts.state.nh.us/district/protocols/dv/index.htm (last visited Oct. 7, 2005). But, even with those numbers, New Hampshire has recognized that an officer may well have difficulty finding a judge: Officers are instructed to "first try to reach a judge from the court . . . [where] the plaintiff resides," and then "if unable to reach any [such] judge" the officer should "try to reach a judge . . . in a city or town close to the town in which the plaintiff resides." *Id.* Here, however, there is no such state actor able and required to locate a judge for the minor when the courts are closed, and the Rolodexes of teens and their doctors are unlikely to be filled with the home phone numbers of multiple judges whom they can attempt to track down, with the minor's condition deteriorating all the while.[9]

Thus, as the Court of Appeals correctly held, even if the doctor, lawyer, and judge work frantically to preserve the patient's health, delay will ensue, and that delay will

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[9] The State's reliance on *Application of the President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964), is misplaced. *See* Pet. Br. at 22 n.4. Far from validating the notion that the judicial bypass could stand in for an emergency exception, the case reveals its dangers. First, the case highlights the need for immediacy in emergencies, noting that the patient could have died "in a matter of minutes." 331 F.2d at 1009. Second, whereas the State claims that the judicial process there "occurred within a span of one hour and twenty minutes," *see id.*, only the appeal occurred in this time frame – and not the process of preparing, submitting, or resolving the original application before the trial judge. Third, these delays occurred even though the original application and the appeal were brought during business hours. *Id.* at 1001; *Application of the President & Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1010, 1011 (D.C. Cir. 1964) (denial of rehearing en banc) (Miller, J., dissenting).

undisputedly endanger minors. "Even when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk." Pet. App. 17.[10] As established by Dr. Goldner's uncontested declaration, when a patient faces a medical emergency such as chorioamnionitis, "every minute the woman remains infected, she is at risk of serious damage to her health"; accordingly, "the best medical course is often to provide an *immediate* abortion." Goldner ¶ 11 (J.A. 25) (emphasis added); *see also id.* ¶¶ 13-15 (describing other medical conditions arising in pregnancy that can require an "immediate abortion"); *see generally supra* Point I.B. The judicial bypass system is thus simply the wrong shape to fit the gaping hole left in the Act by the absence of a medical emergency exception. Even the United States appears to recognize as much. "[I]n the . . . context of emergency health risks, . . . the emergency character of the situation would not allow time for the notification or judicial-bypass options to run their course." Br. for the United States at 8.

Far from curing the Act's lack of an emergency exception, the bypass would necessarily impose the very delay that the Constitution forbids in medical crises. As elaborated *infra* Point I.D., no purpose justifies so endangering teens, and this Court should reject the State's suggestions to the contrary.

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[10] The State's citation to *Akron II* is thus unavailing: Respondents' argument is in no way dependent on the assumption that judges will fail to "'follow mandated procedural requirements,'" Pet. Br. at 22 (quoting *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 515 (1990) (*Akron II*)).

D. The State Interests Served by the Act Do Not Excuse the Need for a Medical Emergency Exception To Protect Minors' Health.

Notwithstanding the State's lengthy explanation of both the permissibility of parental notification laws and the significance of the interests they serve, this case calls neither into question. Simply put, the state interests served by parental involvement laws in non-emergency contexts do not affect the constitutional requirement of an exception to protect minors from dangerous delays when emergencies arise. As this Court's precedents establish, no state interest justifies endangering adult or young women's health through the regulation of abortion.

In *Casey*, for example, this Court recognized that the state may regulate abortion to serve interests "in potential life," in "the health or safety of a woman seeking an abortion," and in ensuring that women make "a decision that is mature and informed." 505 U.S. at 878, 883. Affirming the "essential holding of *Roe*," the Court went on to clarify that whatever the state interests served, the Constitution requires an exception to "assure that . . . abortion regulations [do] not in any way pose a significant threat to the life or health of a woman." *Id.* at 880 (internal quotations and citation omitted); *see also id.* at 833 (reaffirming need for health exception even to post-viability ban, where state interest is at its zenith).

Similarly, the interests underlying parental involvement laws do not abrogate the Constitution's protection for teens' health. If anything, those interests reinforce the need for an emergency exception. The Court has noted "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance

of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (*Bellotti II*). But in this constellation of interests, "[t]he welfare of the child has always been the central concern." *Hodgson*, 497 U.S. at 482 (Kennedy, J., concurring in the judgment in part and dissenting in part). This central concern with minors' welfare is, of course, disserved by imposing delay in emergencies in which delay indisputably causes serious harm. Accordingly, in *Casey*, this Court both acknowledged the interests generally served by parental involvement laws, *see* 505 U.S. at 899-90, and yet insisted that they contain adequate emergency exceptions, *id.* at 879-80, 899.[11]

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[11] Just as in *Casey*, a medical emergency exception in the Act would in no way prohibit physicians from notifying parents that an immediate abortion was necessary to preserve their minor daughter's health – before the abortion if possible, or else after it. All an emergency exception would do is allow the physician to proceed when it is not possible to notify a parent, or not possible to obtain an immediate written certification waiving the Act's forty-eight hour waiting period.

The exception would also permit the physician to provide urgently needed care without notice or delay in those cases – recognized by this Court – in which the parent is abusive or neglectful or will obstruct the abortion by withholding the certification. *See, e.g., Hodgson*, 497 U.S. at 439 & n.25; *id.* at 493 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasizing abuse and neglect exception – one not contained in New Hampshire's Act – in voting to uphold Minnesota's law); *Bellotti II*, 443 U.S. at 647 (noting that some parents will obstruct abortions); *see also* Brief of *Amicus Curiae* National Coalition Against Domestic Violence, *et al.* The undisputed record in this case, which establishes that many abused and neglected minors will simply refuse even urgently needed treatment rather than allow parental notification, reinforces the need for an emergency exception. *See* Atkins ¶¶ 5-6 (J.A. 32-33); Sabino ¶¶ 12, 14 (J.A. 40).

Left with no justification for the Act's imposition of delay in medical emergencies, the State resorts to arguing that the medical exigency of emergencies *itself* justifies the lack of an emergency exception. "[W]hen a minor's health is at risk," the State asserts, "parental notification can help protect [her] . . . health" because parents can "ensur[e] that the physician has all the information needed[,] . . . . assist . . . in selecting . . . health care providers," Pet. Br. at 14-15, and, as one of the State's *amici* adds, obtain information on any potential complications, *see* Brief of New Hampshire Legislators in Support of Petitioner as *Amicus Curiae* (hereinafter Br. of N.H. Legislators) at 26-27. All this may be true, but it does not explain how these benefits of *notice* justify imposing *delay* in emergencies in which delay indisputably harms the minor.

Indeed, New Hampshire itself has recognized that these interests must yield when delay harms the minor. Except for abortion, New Hampshire, like other states, allows for immediate emergency treatment when necessary to protect a minor from serious harm.[12] In those emergencies where New Hampshire allows immediate emergency treatment – no less

[12] *See, e.g.*, Office of the Attorney General, State of New Hampshire, Opinion No. 85-134 (1985) (Opinion of New Hampshire Attorney General that whereas "generally, medical treatment may not be given to a minor without the consent of the child's parent or guardian. . . ., [t]here are exceptions, such as when . . . an emergency exists") (internal citations omitted); N.H. Rev. Stat. Ann. § 507-E:2, II(a) (in civil action claiming physician "failed . . . to obtain . . . informed consent, . . . [t]he plaintiff shall have the burden of proving . . . that the treatment, procedure or surgery was performed in other than an emergency situation"); 1-13 New Hampshire Civil Jury Instructions § 13.2 (Matthew Bender 2004) (stating that physician must obtain consent of patient or other person authorized to give consent "in a nonemergency situation").

than in the undisputed health-threatening emergencies that Respondents have detailed – the State has an interest in parents' helping choose a provider, offering medical history, and receiving information for any follow-up care.

The only difference between the two circumstances is that, in this case, the emergency treatment needed is abortion. But if that difference were enough to justify endangering teens' health, it would effectively demote the status of women's health in abortion jurisprudence, giving states free reign to impose serious medical harms on both adult and minor women through abortion regulations. This Court has repeatedly rejected that proposition, including in both *Roe* and *Casey*, and should reject it again here.

II. THE COURTS BELOW CORRECTLY HELD THAT THE NEW HAMPSHIRE ACT IS FACIALLY INVALID BECAUSE IT FAILS TO PROVIDE A MEDICAL EMERGENCY EXCEPTION.

As both lower courts recognized, the New Hampshire Act is unconstitutional in the absence of a medical emergency exception. The question, then, becomes one of remedy. Adopting the approach that this Court has long followed, the courts below facially invalidated the Act, leaving it to the New Hampshire Legislature to decide whether to reenact a parental notification law with a medical emergency exception and, if so, what the scope of the exception should be. *See, e.g.*, *Stenberg*, 530 U.S. at 929-30; *Thornburgh*, 476 U.S. at 769-71; *see also Casey*, 505 U.S. at 895; *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 482 (1983); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426 (1983) (*Akron I*), *overruled in part on other grounds by Casey*, 505 U.S. 833; *Colautti v.*

Franklin, 439 U.S. 379, 401 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69, 74-78, 82-84 (1976); *Doe v. Bolton*, 410 U.S. 179, 201-02 (1973) (all facially invalidating abortion restrictions). That approach is supported by constitutional principle as well as precedent: Facial invalidation is the only relief that effectively protects the health of New Hampshire teens, and thus remedies the constitutional violation that condemns the present Act, without violating the core institutional values of separation of powers and federalism.

The State offers two principal arguments for why the Court should now depart from its longstanding approach. Neither has merit. The State's initial position is that any judicial remedy should be deferred until a minor in a medical crisis comes forward to challenge the Act. Pet. Br. at 30-34. But waiting to grant relief until individuals in medical crises go to court would endanger minors' health, and thus do nothing to remedy the constitutional violation. In recognition of this fact, for thirty years this Court has permitted pre-enforcement challenges to ensure effective constitutional relief *before* women suffer medical harm or their physicians are prosecuted. This Court should not turn its back on women, or the Court's precedent, now. *See infra* Point II.A.

As a fallback position, the State argues that at most this Court should grant as-applied relief, either on a patient-by-patient basis or, alternatively, by creating a medical emergency exception to the Act that can be applied more categorically. *See* Pet. Br. at 37, 43-46. But limiting the relief to the particular minor before the court suffers from precisely the same flaw as the State's first argument: It requires minors needing emergency care to delay getting appropriate and urgently

needed medical treatment until they get a constitutional ruling permitting it. *See infra* Point II.B.1. The State's final argument is that this Court should "sever" the unconstitutional applications. But the constitutional violation in this case cannot be remedied by excising an unconstitutional provision from an otherwise constitutional law. Rather, severing the unconstitutional applications would require the Court to rewrite the Act to insert a medical emergency exception when the New Hampshire Legislature chose to omit one, and when other legislatures around the country that have included such exceptions have made varying legislative decisions reflected in varying legislative language. *See infra* Point II.B.2.

Facial invalidation thus serves two goals that no other remedy will achieve. It provides pregnant teens in New Hampshire with effective relief to safeguard their health, and it allows the political process to determine the shape of any future legislation within the constitutional parameters reaffirmed by this Court. It is only by facially invalidating the Act that this Court can remain faithful to the institutional values underlying the *Salerno* principle, including judicial restraint, separation of powers, and federalism. *See infra* Point II.C.

Facially invalidating the Act would forge no new frontiers. Where, as here, as-applied relief would both fail to protect women's health and require the Court to rewrite legislation, the Court has not hesitated to strike down unconstitutional abortion restrictions on their face. In *Thornburgh*, for example, this Court did not force individual women to suffer harm before they or their doctors could go to court to seek an exception to the law requiring the presence of a second doctor at any post-viability abortion. Nor did the Court write a medical

emergency exception into the law. Rather, this Court facially invalidated the provision. 476 U.S. at 769-71. Similarly, in *Casey*, this Court facially invalidated a requirement that married women notify their husbands before having abortions primarily because of the provision's impact on battered women. 505 U.S. at 893-95. The Court did not force battered women to come forward to seek relief. Nor did it write an exception into the law. And, indeed, doing so would have been both ineffective and inappropriate: ineffective because, as the Court found, battered women will not reveal the abuse, even to their physicians, and thus could not make use of such exceptions, *id.* at 889-90, and inappropriate because it would have required the Court to make legislative choices and rewrite the provision.[13]

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[13] Of course, in *Casey*, this Court held that abortion restrictions are also facially invalid if they pose a substantial obstacle in a "large fraction of the cases" in which they are relevant, *see Casey*, 505 U.S. at 895, and several Members of the Court have noted the tension between the "large fraction test" and the "no set of circumstances test" articulated in *Salerno*. *See Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O'Connor and Souter, JJ., concurring in the denial of stay and injunction pending appeal); *see also Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 1948 (2004) (noting that the Court permits "overbreadth" facial challenges in the abortion context); *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175-76 & n.1 (1996) (Stevens, J., regarding the denial of cert.) (noting that no set of circumstances test has "been properly ignored").

This case, however, is not the vehicle to explore that tension. Respondents agree with the United States that "the dispute concerning whether to employ the 'no set of circumstances' *Salerno* standard or the 'large fraction' *Casey* standard is largely beside the point in this case," Br. for the United States at 7, because Respondents do not argue that the Act is unconstitutional in a large fraction of cases. For this reason, this Court could appropriately dismiss the First Question Presented – whether the case is governed by *Casey* or *Salerno* – as improvidently granted. The Court can dispose of the Second Question Presented – whether the judicial bypass is

Likewise here, this Court should affirm the lower courts' decision to facially invalidate the Act because no other remedy fulfills the Court's constitutional obligation to protect women's health while respecting the limits of the judicial role.

A. Pre-Enforcement Facial Challenges Are the Only Effective Mechanism for Protecting Minors' Health.

For over three decades, this Court has permitted challenges to abortion restrictions without requiring that women first endanger their health or that their doctors first subject themselves to prosecution. *See, e.g.*, *Stenberg*, 530 U.S. at 922; *Casey*, 505 U.S. at 845; *Thornburgh*, 476 U.S. at 752; *Colautti*, 439 U.S. at 383. Without so much as a nod to these cases, the State argues that this Court should grant *no relief* until faced with a "concrete case[]" of a teen needing an emergency abortion. *See* Pet. Br. at 30-34. In essence, the State argues that Dr. Goldner should have waited until he had a "concrete case" of a patient experiencing serious blood loss or, perhaps, a dangerous infection, and then brought an as-applied challenge on her behalf.

But this Court has never required women to wait until they were on the brink of disaster before granting relief. For example, in *Thornburgh*, this Court did not turn the physician-plaintiffs away and tell them to come back when they had a patient who was endangered by the delay inherent in waiting for a second physician to arrive. *See* 476 U.S. at 771. Nor did the *Casey* Court decline to consider the adequacy of the medical emergency exception until a woman with pre-eclampsia in need

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an adequate substitute for an emergency exception – in the same manner because it is a question about which there is no circuit split.

of an immediate abortion presented herself to the Court. *See* 505 U.S. at 879-80. The suggestion would have been woefully inadequate to protect women's well-being.

The same is true here. Leaving young women whose medical conditions are so urgent that they cannot comply with the Act with no recourse except the possibility of mounting an as-applied constitutional challenge effectively forecloses any relief at all. Indeed, the State's argument that this Court should wait to consider the constitutionality of the Act in an as-applied challenge brought by (or on behalf of) a woman in the throes of a medical emergency is an even more radical and dangerous version of its argument that the judicial bypass would suffice in emergencies. In this context, unlike in the bypass, there are no statutory guarantees of confidentiality and expedition; the proceedings are adversarial; and the minor must argue and the court must decide whether the Act is constitutional. It is thus for good reason that this Court has never relegated women to such a process for protecting their health.

Appearing to recognize that forcing a minor in a medical crisis to go to court before obtaining medical care is likely to give this Court pause, the United States attempts to assuage any concern by arguing that a woman or her doctor may seek "pre-enforcement relief" before actual injury has been suffered, *see* Br. for the United States at 15-16. But this confusing argument is disingenuous at best.

Perhaps the United States believes that the case at bar was properly brought, and that the only issue left to resolve is the appropriate scope of relief. If that is so, Respondents agree and explain more fully below why facial invalidation is appropriate in this case. *See infra* Point II.B.2. The only other way to allow

"relief . . . before irreparable injury has . . . been suffered," as the United States suggests, Br. for the United States at 15, would be to permit a healthy minor to bring suit. But a healthy minor would not have standing to challenge the Act's lack of a medical emergency exception.[14] *See, e.g.*, *Roe*, 410 U.S. at 127-29 (holding that a nonpregnant woman and her husband did not "present an actual case or controversy" as required to challenge Texas's abortion ban). If the United States takes neither of those positions, then its assertion that pre-enforcement relief is still available can only refer to an action brought by (or on behalf of) a woman in need of an emergency abortion before the law has been "enforced" against the doctor. But that argument is no less callous than the State's, for it would preclude courts from granting any relief at all until faced with a woman in crisis. As explained above, for the bleeding minor at risk of permanent kidney and liver damage or the seriously infected teen in danger of losing her ability to ever bear a child, that is too late.

Whether formulated explicitly by the State or implicitly by the United States, the argument that no relief is appropriate absent a "concrete" minor in a "concrete" crisis is radical and dangerous. Acceptance of this argument – no less than acceptance of the State's argument that no medical emergency exception is required – would necessarily reverse three decades

[14] The absence of standing, of course, cannot be "addressed" through the ripeness doctrine as the United States suggests, Br. for the United States at 15 n.6.

of precedent forbidding states to endanger women's health when they restrict abortion. This the Court should not do.[15]

B. Facial Invalidation Is the Only Remedy that Protects Minors Without Violating Core Separation of Powers and Federalism Principles.

The State's fallback position – that this Court should grant only as-applied relief – fares no better. Facial invalidation is the only remedy that is both effective in preventing the State from endangering minors' health, and institutionally proper.

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[15] In an effort to advance its claim that this Court should grant no relief in this case, the State at times appears to mount a covert attack on the ability of doctors to raise the constitutional claims of their patients. *See, e.g.*, Pet. Br. at 30 (arguing that under "the rule barring third party standing" "'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court'" (quoting *New York v. Ferber*, 458 U.S. 747, 767 (1982)). But any such argument is defeated by this Court's unbroken chain of decisions over the last three decades holding that doctors have third-party standing to raise the rights of their patients. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 444 (1972); *Doe*, 410 U.S. at 188; *Danforth*, 428 U.S. at 62; *Singleton v. Wulff*, 428 U.S. 106, 114-18 (1976) (plurality opinion); *Casey*, 505 U.S. at 845; *Stenberg*, 530 U.S. at 922.

Contrary to the claims of some of the State's *amici*, nothing in *Kowalski v. Tesmer*, 543 U.S. 125, 125 S. Ct. 564 (2004), changes this. Indeed, in *Kowalski*, this Court specifically recognized reproductive health cases as an exception to the Court's general prohibition on third-party standing. *Id.* at 568 (citing, *inter alia*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Doe v. Bolton*). Moreover, the Court has repeatedly held that, unlike the plaintiffs in *Kowalski*, physicians and clinic personnel can raise the rights of their patients because they have a close relationship, *Griswold*, 381 U.S. at 481, and because women may be hindered from bringing their own claims, *Singleton*, 428 U.S. at 117.

1. Limiting minors to as-applied relief endangers their health.

In advancing its as-applied argument, the State first appears to suggest that federal courts should consider the situation of each individual minor on a patient-by-patient basis to determine whether the Act is unconstitutional as applied to that minor. *See* Pet. Br. at 42 ("[N]othing would prevent an abortion provider from bringing an expedited case to enjoin the application of a statute against a *particular* woman." (emphasis added)). But this is just a corollary of its argument that the Court should grant no relief at all until faced with a minor in a medical emergency, and must fail for the reasons explained in Point II.A *supra*.

Moreover, if the Court adopted the State's as-applied approach, the danger would not be limited to the first teen who needed an emergency abortion. Contrary to the State's half-hearted suggestion, Pet. Br. at 42 n.6 ("An as-applied challenge also has the impact of stare decisis."), a ruling that the Act is unconstitutional as applied to the first teen will do little, if anything, to aid the next teen with a medical emergency. Even if the factual scenarios of all teens facing medical emergencies were sufficiently similar, it simply is not the case that a ruling by a trial judge has *stare decisis* effect. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.10 (1996). In addition, as even the State appears to acknowledge, a ruling that the Act is unconstitutional as applied to teen A with preeclampsia and dangerously high blood pressure will not permit a physician to provide immediate care to teen B with a severe infection at risk of systemic sepsis. *See* Pet. Br. at 42 n.6 ("[W]omen who are *similarly situated* will not *necessarily* have

to bring their own challenge . . . ." (emphases added)). Indeed, it is doubtful that a ruling that the Act is unconstitutional as applied to teen A would even suffice to protect teen C whose blood pressure is also dangerously high but somewhat lower than teen A's.[16]

In addition, if the State's argument were accepted, the effects would not be limited to challenges to parental involvement laws lacking emergency exceptions. Rather, it would apply to all abortion restrictions, including abortion bans, spousal notification provisions, second-trimester hospital requirements, and so on. *See Ada v. Guam Soc'y of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting from denial of cert.) (arguing that lower courts "should have dismissed" facial challenge to across-the-board abortion ban because there were "apparently some applications of the statute that are perfectly constitutional"). As the article the State cites in support of its argument expressly acknowledges, if courts did not facially invalidate unconstitutional abortion restrictions, each individual woman would have to go to court for a "determination of whether enforcement [of any of a myriad of abortion restrictions] against [her] would constitute an undue burden." Kevin Martin,

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[16] Nor is the United States's suggestion of a class action, *see* Br. for the United States at 15, a panacea. As an initial matter, it is not at all clear that such a class would meet the requirements of Rule 23(a). *See* Fed. R. Civ. P. 23(a) (permitting class actions only where class meets requirements of commonality, typicality, and numerosity). Moreover, the Government is either envisioning a class representative who is a healthy teen (in which case she lacks standing) or it is suggesting a scenario in which a minor (or perhaps multiple minors) must endanger her (or their) health by waiting to seek relief until facing a medical emergency. *See supra* Point II.A. Either way, the suggestion should be dismissed out of hand.

Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence, 99 Colum. L. Rev. 173, 213 (1999); *see also id.* (arguing that if a state passed an abortion ban women could go – one by one – through a quasi-judicial bypass proceeding to have the statute held unconstitutional as to them). Far from providing "a readily administrable standard," *see* Br. for the United States at 11, limiting women to as-applied relief would force the federal courts to act as abortion committees to decide whether individual women are entitled to obtain an abortion. *See, e.g., Doe*, 410 U.S. at 184-85, 195-98 (describing hospital abortion committees that some states required to approve individual requests for an abortion prior to *Roe*).

And, of course, many women with meritorious constitutional claims would not or could not come forward to seek vindication of their rights. For example, many, if not most, battered women would not go to court to seek an exemption from a spousal notification law. *See Casey*, 505 U.S. at 889-90. Thus, precluding facial invalidation would unconscionably force women to choose between risking their safety and foregoing their right to have an abortion. It is precisely because of this type of chilling effect on the exercise of constitutional rights that the Court has held that facial invalidation is appropriate.

2. Categorical as-applied relief would violate separation of powers and federalism principles.

In a last-ditch attempt to save the Act, the State suggests that this Court "sever" the unconstitutional applications. *See* Pet. Br. at 43-46. This suggestion is overly simplistic and creates serious institutional conflicts: As explained in Point II.A.1. *supra*, granting relief patient-by-patient or condition-by-

condition will leave doctors uncertain, indeed doubtful, about whether they can provide immediate treatment to the next critically ill patient.[17] In order to provide clear guidance to doctors so that they may act to protect their patients' health, this Court would have to craft relief that would be indistinguishable from drafting an emergency exception and engrafting it onto the Act. But the responsibility for such a task lies with the legislature, not the judiciary. Indeed, judicially re-writing the Act would impermissibly intrude on the legislative domain; contravene legislative intent; and encourage legislatures to abdicate their duty to pass constitutional laws. This Court should therefore reject the State's suggestion and leave to the New Hampshire Legislature the decision of whether and how to redraft the law to comply with this Court's well-established precedent.

As this Court has long recognized, "it is for [the Legislature], not this Court, to rewrite . . . statute[s]." *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). Thus, "[i]n considering a facial challenge, this Court may impose a limiting construction on a statute only if it is 'reasonably susceptible' to such construction": federal courts may "'not rewrite a . . . law to conform it to constitutional requirements.'" *Reno v. ACLU*, 521

[17] Without clear guidance, the Act, with its criminal penalties, will have an impermissible chilling effect on physicians attempting to provide appropriate emergency care. *See Colautti*, 439 U.S. at 394 (holding that abortion regulation that imposes criminal liability based on ambiguous criteria creates "serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights"); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 205 (6th Cir. 1997) (finding that "[i]n an area as controversial as abortion," "the determination of whether a medical emergency . . . exists . . . is . . . susceptible to being subsequently disputed by others").

U.S. 844, 884-85 (1997) ("*ACLU*") (quoting *Virginia v. Am. Booksellers Ass'n Inc.*, 484 U.S. 383, 397 (1988)); *see also Stenberg*, 530 U.S. at 944 (holding that Court is "'without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent'" (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1998))); *Thornburgh*, 476 U.S. at 769 (facially invalidating abortion restriction where "the language of the statute 'is not susceptible to a construction that does not require the mother to bear an increased medical risk'" (internal citations and quotations omitted)). Here, the State proffers no construction of the Act – reasonable or otherwise – that would allow this Court to interpret it to include an exception for medical emergencies.[18] Indeed, to the extent that there was any argument at all to be made on this score, the State has abandoned it. *See supra* n.8.

Ensuring that the task of writing statutes is left to the legislature is particularly important where, as here, drafting language to salvage the statute is not a "relatively simple matter." *See United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995) ("*NTEU*") (refusing to limit relief where doing so would require Court to choose among different formulations to craft the remedy). Legislatures around the country have defined their emergency exceptions to parental

[18] New Hampshire law similarly requires facial invalidation where saving the law would require judicial rewriting. *See, e.g., State v. Brobst*, 857 A.2d 1253, 1257 (N.H. 2004) (facially invalidating statute where State "has advanced no persuasive [limiting] construction, nor can we envision one, that would allow us to limit the scope of the statute without invading the province of the legislature").

involvement laws in numerous, very different ways.[19] And the New Hampshire Legislature itself, in considering abortion regulations, has weighed several quite varied emergency exceptions.[20] Choosing which, if any, of these formulations is used is a matter of critical importance to the legislators. Brief

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[19] *Compare, e.g.*, R.I. Gen. Laws § 23-4.7-4 (providing exception "[w]here there is an emergency requiring immediate action"), *with* Kan. Stat. Ann. § 65-6705 (providing exception "if in the best medical judgment of the attending physician based on the facts of the case, an emergency exists that threatens the health, safety or well-being of the minor as to require an abortion"), *and* La. Rev. Stat. Ann. § 40:1299.35.12 (providing exception where "a medical emergency compels the immediate performance of an abortion because the continuation of the pregnancy poses an immediate threat and grave risk to the life or permanent physical health of the pregnant woman"), *and* 18 Pa. Cons. Stat. Ann. § 3203 (providing exception when a "condition . . . , on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function").

[20] *Compare, e.g.*, S.B. 442, 1998 Session (N.H. 1998) (bill requiring women to delay their abortions following the provision of information, defining medical emergency as a condition "which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function"), *with* H.B. 1278, 2002 Session (N.H. 2002) (similar bill with exception for circumstances when "in the opinion of the health care practitioner, the health of the mother is endangered"), *and* H.B. 1380, 2002 Session (N.H. 2002) (parental consent bill with exception when "in the best medical judgment of the physician based on the facts of the case before such physician, a medical emergency exists that so complicates the pregnancy as to require an immediate termination of the pregnancy").

of *Amici Curiae* New Hampshire Representative and HB 763 Sponsor Kathleen Souza, *et al.*, in Support of Petitioner at 13 (hereinafter Br. of N.H. Rep. Souza) ("The [medical emergency] definition acts as a loophole to avoid parental notice; the precision or breadth of the definition defines the size of that loophole."). Yet nothing in the Act or any other source of legislative intent provides a guide to that decision.[21] Where, as here, the Court "cannot be sure that [its] attempt to redraft the statute . . . would correctly identify the [exception the legislature] would have adopted," the "[Court's] obligation to avoid judicial legislation" requires that the "task of drafting" a constitutional statute be left to the legislature.[22] *NTEU*, 513 U.S. at 479 & n.26; *see also ACLU*, 521 U.S. at 885 (upholding facial invalidation where neither "the text [n]or other source of [legislative] intent identified a clear line that [the] Court could

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[21] Even if one assumes that the New Hampshire Legislature would prefer a parental notification law with the narrowest possible exception to no law at all – and there is no basis in the record for that assumption – there are sound reasons for this Court to decline to rewrite the Act. Determining the precise nature and scope of the minimally adequate exception itself raises serious constitutional questions that the parties have never briefed because the Act, as drafted by the New Hampshire Legislature, did not raise them. Where, as here, granting as-applied relief "would likely raise independent constitutional concerns whose adjudication is unnecessary to decide this case," facial invalidation is appropriate. *NTEU*, 513 U.S. at 479.

[22] This case is thus distinguishable from cases like *United States v. Grace*, 461 U.S. 171 (1983), and *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). As this Court has recognized, in those cases, narrowing the text to exclude the unconstitutional applications was a "relatively simple matter," *NTEU*, 513 U.S. at 479 n.26 (distinguishing *Grace*), because the text of the law or some other source of legislative intent "identified a clear line that this Court could draw," *ACLU*, 521 U.S. at 884-85 (distinguishing *Grace* and *Brockett*).

draw"); *Claremont Sch. Dist. v. Governor*, 744 A.2d 1107, 1112 (N.H. 1999) (refusing to sever unconstitutional portions of statute because "the court cannot choose for the lawmakers; to [do so] . . . would be an act of legislation not of construction." (internal citation and quotations omitted)).[23]

The Act's severability clause does not alter this conclusion. As an initial matter, although the severability clause mentions unconstitutional applications of the statute three times, it declares only that the "*provisions*," not the applications, are severable. *Compare* Act § 132:28 (declaring that if "any provision of this subdivision or the application thereof to any person or circumstances is held invalid . . . *the provisions* of this subdivision are severable" (emphasis added)), *with* 21 U.S.C. § 901 ("If a provision of this Act is held invalid in one or more of its applications, the provision shall remain in effect in all its valid applications that are severable."). Moreover, even if meant to permit the severance of applications, the presence of such a generic severability clause is hardly dispositive of the issue. *See United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause."); *see also In re Petition of New Hampshire Bar*

[23] The suggestion by the State's *amici* that this Court simply carve out an additional exception from the Act's requirements in a manner that "conform[s] to the definition of medical emergency upheld in *Casey*," Brief *Amicus Curiae* of the Thomas More Society at 27 n.28, illustrates the problem. Accepting this suggestion would require the Court not only to engraft onto the Act a fifty-four word definition of medical emergency, *see Casey*, 505 U.S. at 902 (reprinting 18 Pa. Cons. Stat. Ann. § 3203), but also to choose Pennsylvania's definition over other possibilities without any indication that New Hampshire would have so chosen.

Ass'n, 855 A.2d 450, 457 (N.H. 2004) (invalidating entire statutory provision despite presence of severability clause); *Opinion of the Justices*, 208 A.2d 458, 462 (N.H. 1965) (same). Where, as here, severing the unconstitutional applications would require the Court to make choices appropriately made by the legislative branch or to rewrite the statute, severance is inappropriate. *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (refusing to sever unconstitutional provisions where the Court "would be required not merely to strike out words, but to insert words that are not now in the statute. . . . [,] substitut[ing] the judicial for the legislative department of the government'" (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875))); *Claremont*, 744 A.2d at 1112 (refusing to apply presumption of severability where severance would require court to make legislative choices).

Furthermore, severing unconstitutional applications is inappropriate unless it is clear that doing so effectuates legislative intent. Here, the New Hampshire Legislature intentionally omitted a medical emergency exception, in blatant violation of three decades of this Court's precedents. *See* Br. of N.H. Rep. Souza at 13 (explaining purposeful exclusion of an exception for anything but "truly life-threatening emergenc[ies]" and objecting to any broader emergency exception because "the greater the emergency – short of a truly life threatening emergency – the greater the need for parental notice"); Pet. App. 16 ("The New Hampshire legislature's intent that abortions not in compliance with the Act's notification provisions be prohibited in [medical emergencies] is clear."). At the time it passed the Act, the Legislature had every reason to believe that the Act would be held facially unconstitutional based on this Court's precedents. *See, e.g.*,

Stenberg, 530 U.S. at 930-38; *Thornburgh*, 476 U.S. at 769, 770-71; *Roe*, 410 U.S. at 165; *see also Owens*, 287 F.3d 910 (facially invalidating parental notice law with medical emergency exception limited to imminent death). Where the constitutional rule is clear and the legislature has purposefully crafted a law in violation of that rule, this Court cannot be sure that the legislature would have wanted the law to be saved by inserting an emergency exception. *See* Brief of *Amicus Curiae* NARAL Pro-Choice America Foundation, *et al.* (hereinafter Br. of NARAL).[24] Indeed, the brief filed on behalf of a group of over 100 New Hampshire Legislators as *Amici Curiae* in Support of Respondents casts significant doubt on this score. *See* Brief for *Amici Curiae* New Hampshire State Rep. Terie Norelli and Over One Hundred Other State Legislators Supporting Respondents.[25] In such instances, facial invalidation is appropriate. *Carson v. Maurer*, 424 A.2d 825, 839 (N.H. 1980) (per curiam) (holding that despite presumption of severability, severance is inappropriate where the court is "not sure" that the legislature would have enacted the valid provisions of law without the invalid ones); *Heath v. Sears*,

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[24] Because the Legislature had every reason to know that the Act was unconstitutional, this case is in marked contrast to *United States v. Booker*, where "a legislatively unforeseen constitutional problem" rendered the federal Sentencing Guidelines unconstitutional, 125 S. Ct. 738, 757 (2005).

[25] The State's *amici* demonstrate the unwavering opposition to medical emergency exceptions of many groups that advocate for abortion restrictions. *See, e.g.*, Brief *Amici Curiae* of the United States Conference of Catholic Bishops, *et al.* at 9-10 (arguing that for any "abortion regulation that falls short of an outright ban, requiring a medical emergency or health exception would be incoherent" and amount to "no regulation at all"); Brief of *Amicus Curiae* Eagle Forum at 13 (arguing that a medical emergency exception "defeats and cripples the statute").

Roebuck & Co., 464 A.2d 288, 299 (N.H. 1983) (same); *see also Thornburgh*, 476 U.S. at 770-71 (facially invalidating law after "conclud[ing] that the legislature's failure to provide a medical-emergency exception . . . was intentional"); *Akron I*, 462 U.S. at 452 n.45 (refusing to sever unconstitutional word from abortion restriction where there was "doubt as to whether the city would have enacted" the provision without the unconstitutional word); *Marchetti*, 390 U.S. at 59 (facially invalidating, despite severability clause, where Court "cannot know how Congress would assess" competing concerns because Court was "entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values").[26]

Finally, were the Court to draft a medical emergency exception for the Act, the invasion of the legislative province would not end with this case. Where, as here, a legislative body deliberately chooses to push beyond well-established constitutional limits, saving the law would invite legislatures to abdicate their responsibility to pass laws that conform with the

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[26] The cases cited by the State are not to the contrary. *See* Pet. Br. at 44-45. Rather, those cases stand for the unremarkable proposition that if (as is not the case here) "[t]here is nothing in the act . . . indicating an intention to obstruct or impede the operation of the Constitution," the courts should "presume that [the legislature] intended to keep within the limits of the constitution" and so construe the law. *In re Opinion of the Justices*, 41 N.H. 553, 1861 WL 2006, at *1-2 (N.H. 1861) (upholding law where statute could reasonably be construed to render it constitutional). Indeed, the cases cited by the State explicitly acknowledge that this rule has its limits: It "is not to be applied if it gives the statute a meaning the Legislature did not intend, either by addition to or subtraction from its terms." *Woolf v. Fuller*, 174 A. 193, 196 (N.H. 1934); *see also In re Opinion of the Justices*, 190 A. 801, 806 (N.H. 1937) (noting limitation on presumption of severability).

Constitution, leaving this Court to rewrite law after law. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 552 (2004) (Rehnquist, C.J., dissenting) (objecting to "as-applied approach" because it "eliminates any incentive for Congress to craft [constitutional] legislation . . . [as] Congress can now simply rely on the courts to sort out [which applications are constitutional]"). As this Court long ago explained:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

Reese, 92 U.S. at 221 (holding Court could not save act of Congress by limiting its application to constitutionally permissible circumstances). Judicial rewriting of statutes thus diminishes the legislature's "'incentive to draft a [constitutional] law in the first place,'" *ACLU*, 521 U.S. at 885 n.50 (quoting *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)), and "significantly reduce[s the legislature's] incentive to stay within constitutional bounds," *Massachusetts v. Oakes*, 491 U.S. 576, 586 (1989) (Scalia, J., concurring in judgment in part on behalf of five Justices). In addition to the institutional concerns, such legislative abdication will have serious repercussions for citizens who count on legislators, not just courts, to respect and safeguard their constitutional rights. If legislatures can pass plainly unconstitutional laws, expecting no worse than a judicial fix, the onus then falls on individuals to defend their rights through costly and burdensome litigation. Citizen litigation,

however, should be a last resort – not the default rule for protecting constitutional liberties.

Where, as here, "severing" the unconstitutional applications of a statute would require the judiciary to usurp the legislature's policy-making prerogative and to draft statutes, as well as encourage legislative abdication, facial invalidation is the only appropriate remedy.

C. The Principles Underlying the *Salerno* Rule Counsel in Favor of Facial Invalidation.

Relying on *Salerno*, the State attempts to convince the Court that facial invalidation threatens core institutional values. But to the extent that those values are implicated by this case, they counsel in favor of, not against, facial invalidation.

The *Salerno* principle is animated by three sets of concerns: (1) concerns about making constitutional decisions absent adequate facts; (2) federalism and separation of powers concerns that counsel against invalidating a law where another branch of government might interpret it to avoid constitutional difficulties; and (3) a desire to minimize intrusion on the legislature's policy-making prerogative. *See, e.g., Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 977 (1984) (Rehnquist, C.J., dissenting); *Ferber*, 458 U.S. at 768.

Protection of the first principle – ensuring that the Court has "'data relevant and adequate to an informed judgment,'" *see* Pet. Br. at 33 (quoting *Ferber*, 458 U.S. at 768) – is of no concern here. As explained above, the *undisputed* record in this case demonstrates that requiring minors in medical emergencies to delay their abortions to comply with the Act will seriously harm their health. *See supra* Point I.B. In such circumstances,

this Court need not await "a concrete case" of a woman in the midst of a medical emergency to assure itself that it is making a fully informed decision. Moreover, the need to adhere to this prudential rule is at its strongest where the Court is called upon to "adjudicat[e] difficult and novel constitutional questions," *see Ferber*, 458 U.S. at 781 (Stevens, J., concurring in judgment). Whether an abortion restriction that indisputably endangers minors must include an emergency exception is neither a "difficult" nor a "novel" constitutional question.

The second principle – permitting state courts and other branches of government the opportunity to construe a law to avoid constitutional infirmities – has no application here. Contrary to the position it took in the lower courts, the State no longer argues that there is an interpretation of the Act that would render it constitutional. *See supra* n.8. Nor has the Attorney General declared that the Act will not be enforced against physicians who perform immediate abortions for patients whose health would be seriously threatened by delay.[27]

Because the State has proffered no construction – saving or otherwise – this case differs markedly from *Rust v. Sullivan*, 500 U.S. 173 (1991), upon which the State relies, *see* Pet. Br. at 28, 34, 36. In *Rust*, the plaintiffs argued that the challenged regulations would not permit a family planning facility "to refer a woman whose pregnancy places her life in imminent peril to

[27] For these reasons, this case does not raise the concern held by some Members of the *Stenberg* Court that invalidating the Nebraska ban prior to enforcement "denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute," 530 U.S. at 979 (Kennedy, J., dissenting). *See also* Br. of N.H. Rep. Souza at 13 (explaining that legislators did not intend for Act to include medical emergency exception).

a provider of abortions." 500 U.S. at 195. The Court rejected plaintiffs' facial challenge – not because of the lack of a "concrete case" of a woman whose life was in imminent peril or because the regulations would be entitled to stand if they only harmed the relatively small number of women whose pregnancies put their lives at risk. Rather, the Court rejected the challenge because it did "not read the regulations to bar abortion referral or counseling in such circumstances." *Id.* at 195.[28] Here, in contrast, the State has not argued that the Act should be read to permit an immediate abortion where the delay seriously endangers a minor's health.[29]

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[28] Notably, if the State were correct that the fact that only a relatively small number of New Hampshire minors may need an emergency exception were enough to defeat Respondents' claim here, there would have been no need for the *Rust* Court to interpret the regulations at issue there. The percentage of women seeking family planning services at Title X clinics whose pregnancies place their "li[ves] in imminent peril" is surely no greater than the percentage of minors who are in need of an emergency exception to the Act.

[29] For the same reasons, the State's citation of *Akron II* and *Webster* are inapposite. As in *Rust*, in those cases, this Court refused to invalidate the statutes based on the plaintiffs' claims that the statutes might be interpreted or applied in a manner not clearly contemplated by the statutes. *See Akron II*, 497 U.S. at 513-14 (refusing to facially invalidate parental consent law for failure to provide expeditious bypass where plaintiffs' argument that bypass could take 22 days was based on an unsupported interpretation of the law and ignored a provision that permitted a minor to request that the time frame be shortened); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 523-24 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (rejecting plaintiffs' argument that because "the State *could try* to enforce the ban [on the use of a '*public facility*' to perform or assist with an abortion] against *private* hospitals using public water and sewage lines, or *private* hospitals leasing state-owned equipment or state land," the ban should be

Third, as explained above, *see supra* Point II.B.2, preventing judicial usurpation of the legislature's right to make policy decisions counsels in favor of, not against, facial invalidation here. Moreover, unlike other instances where this Court has invoked *Salerno* and declined to invalidate a statute, facial invalidation of the Act will not impair a complex scheme[30] or have otherwise devastating consequences for minors' well-being.[31] For the past thirty years, New Hampshire minors have been able to consent to abortion, without mandatory parental involvement. Nothing in the record of this case and – as the brief filed by the American College of Obstreticians and Gynecologists, the American Medical Association, and the American Academy of Pediatrics explains – nothing in the history of minors' access to abortion care in the other states that do not mandate parental involvement suggests that affirming the injunction will result in any harm to minors. *See* Brief of ACOG, *et al.* Thus, facial invalidation will neither implicate long-established New Hampshire law, nor create disastrous or unforeseeable new consequences. On the contrary, maintaining the status quo will ensure that teens in

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facially invalidated, where "straightforward" applications of the ban were constitutional (emphases added)).

[30] *Cf. Booker*, 125 S. Ct. at 757-759 (declining to facially invalidate in the "context [of the] highly complex statute, [and] interrelated provisions" of federal sentencing scheme).

[31] *Cf. Califano v. Westcott*, 443 U.S. 76, 90 (1979) (declining to facially invalidate statute because "suspending the program's operation would impose hardship . . . upon innocent recipients of government largesse," some 300,000 impoverished children).

New Hampshire can continue to obtain immediate abortion care when necessary to prevent significant risks to their health.

Finally, facial invalidation will not leave New Hampshire powerless to pass a parental involvement law that complies with the federal Constitution if it so chooses. New Hampshire suffers no lack of models if it wants to do so.[32] Allowing the Legislature to decide among the available choices for a medical emergency exception demonstrates deference to, not disregard for, the legislature's role.

III. THE DEATH EXCEPTION ENDANGERS MINORS' LIVES AND IS CONSTITUTIONALLY INADEQUATE.

In addition to failing to protect minors' health, the Act fails to provide a meaningful exception even when a minor faces life-threatening circumstances. The Act permits a physician to perform a life-saving abortion without delay only if the physician can "certif[y]" that an "abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." Act § 132:26, I(a). The First Circuit correctly held this provision constitutionally deficient on two independent grounds. "[I]ts time requirement is drawn too narrowly, and . . . it fails to safeguard a physician's good-faith medical judgment that a minor's life is at risk." Pet. App. 21;

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[32] Given the combination of clear precedent from this Court and the success of other states in passing constitutionally sound parental involvement laws with adequate medical emergency exceptions, the complaint of some *amici* that facial invalidation of the Act would impose a "standard that requires virtually perfect legislation" rings hollow. *See* Br. of N.H. Legislators at 3; *see also* Brief of *Amici Curiae* James P. Weiers, Speaker of the Arizona House of Representatives, *et al.* at 3.

see also id. at 35-36.[33] The State has failed to respond meaningfully or consistently to these deficiencies. Indeed, its newest interpretation of the death exception (one not argued below) only reconfirms that this exception is inadequate to protect pregnant minors facing life-threatening emergencies.

As the Court of Appeals found, physicians cannot always determine when a critically ill patient will die. Pet. App. 18-19; *see also* Goldner ¶ 17 (J.A. 27). Thus, "the time component of the Act's death exception forces physicians either to gamble with their patients' lives in hopes of complying with the notice requirement before a minor's death becomes inevitable, or to risk criminal and civil liability by providing an abortion without parental notice." Pet. App. 18-19. The State does not dispute this. Rather, it argues that it is not constitutionally problematic because if the physician is unable to make the required determination, he can obtain a parent's written, certified waiver of the delay, or seek court authorization pursuant to the judicial bypass provision. Pet. Br. at 26-27. For the reasons discussed above, *see supra* Point I.C & n.11, the Constitution requires

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[33] The courts below did not reach Respondents' claim that the death exception is also impermissibly narrow because it does not permit an abortion when it is the best, but not the only, option for saving a minor's life. *See Colautti*, 439 U.S. at 400 (holding that in context of abortion statute "the word 'necessary' suggests that a particular technique must be indispensable to the woman's life or health – not merely desirable – before it may be adopted"); *see also* Pet. App. 18 n.7. Because the restrictive language in the death exception requires Dr. Goldner to use less safe life-saving treatments while attempting to satisfy the Act's requirements, *see* Goldner ¶ 18 (J.A. 28) (describing serious risks that alternative treatments pose), it is unconstitutional. *See Stenberg*, 530 U.S. at 931, 936-37; *Thornburgh*, 476 U.S. at 768-69; *Danforth*, 428 U.S. at 76-79.

more when a woman's life is at stake. *See Stenberg*, 530 U.S. at 930-31; *Casey*, 505 U.S. at 880.

Additionally, the court below correctly held that the Act's uncertain scienter standard and the attendant threat of "*post hoc* second guessing" through an objective standard of "negligence" would "impermissibly chill physicians' willingness and ability to provide lifesaving abortions." Pet. App. 20; *see Colautti*, 439 U.S. at 390-91 (holding where "it is unclear whether the statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard," abortion restriction has impermissible chilling effect). This holding was based on the State's own proposed reading of the Act – which incorporated both good faith *and* objective reasonableness standards – and on the fact that a construction precluding the possibility of an objective standard was not reasonable and readily apparent under New Hampshire law. Pet. App. 20; *see also* Def. Objection to Request for Decl. & Inj. Relief at 8 (arguing that to comply with the Act, physician's good faith medical judgment must *also* be "objectively reasonable"); Br. of Def.-Appellant at 20 (arguing that it is not unconstitutional or vague for the Act to "prescrib[e] a standard including components of good faith and reasonableness"). In this Court, however, the State abandons its argument that the Act does, or can, include a reasonableness requirement, simply asserting, "there is no reason to believe that New Hampshire courts would not interpret [the Act] to protect the good faith judgment of abortion providers." Pet. Br. at 25. Given the State's own vacillation and confusion about the Act's scienter standard (or standards), it is hard to imagine how doctors faced with the prospect of criminal liability can know which standard will apply or take comfort that, after having provided a life-saving

abortion, the State will not later hold them to an objective standard. The chilling effect of this uncertainty endangers minors in the most dire circumstances, and renders the Act unconstitutional.

IV. RESPONDENTS ARE ENTITLED TO A REMAND OF THEIR REMAINING CLAIM SHOULD THE COURT REVERSE THE DECISION BELOW.

Finally, should this Court reverse the Court of Appeals, the case should be remanded so that the lower courts may reach Respondents' remaining, independent claim that the Act is unconstitutional because its judicial bypass provision fails to "assure that a resolution of the [minor's petition for a waiver], and any appeals that may follow, will be completed with anonymity," *Bellotti II*, 443 U.S. at 644. Although the courts below recognized that this claim presented serious constitutional concerns, neither reached the merits. Pet. App. 21-22, 37-38. Where, as here, a distinct claim was neither "passed upon by [the courts below] nor adequately presented here" it is "appropriate to remand the case" for consideration. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468 (1947) (citing *United States v. Ballard*, 322 U.S. 78, 88 (1944)).

CONCLUSION

For these reasons, this Court should affirm.

Respectfully submitted, October 12, 2005

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE *v.* PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 04–1144. Argued November 30, 2005—Decided January 18, 2006

New Hampshire's Parental Notification Prior to Abortion Act, in relevant part, prohibits physicians from performing an abortion on a pregnant minor until 48 hours after written notice of such abortion is delivered to her parent or guardian. The Act does not require notice for an abortion necessary to prevent the minor's death if there is insufficient time to provide notice, and permits a minor to petition a judge to authorize her physician to perform an abortion without parental notification. The Act does not explicitly permit a physician to perform an abortion in a medical emergency without parental notification. Respondents, who provide abortions for pregnant minors and expect to provide emergency abortions for them in the future, filed suit under 42 U. S. C. §1983, claiming that the Act is unconstitutional because it lacks a health exception and because of the inadequacy of the life exception and the judicial bypass' confidentiality provision. The District Court declared the Act unconstitutional and permanently enjoined its enforcement, and the First Circuit affirmed.

Held: If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief. Pp. 4–10.

(a) As the case comes to this Court, three propositions are established. First, States have the right to require parental involvement when a minor considers terminating her pregnancy. Second, a State may not restrict access to abortions that are " 'necessary, in appropriate medical judgment for preservation of the life or health of the

mother.'" *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 879 (plurality opinion). Third, New Hampshire has not taken issue with the case's factual basis: In a very small percentage of cases, pregnant minors need immediate abortions to avert serious and often irreversible damage to their health. New Hampshire has conceded that, under this Court's cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks. Pp. 4–6.

(b) Generally speaking, when confronting a statute's constitutional flaw, this Court tries to limit the solution to the problem, preferring to enjoin only the statute's unconstitutional applications while leaving the others in force, see *United States* v. *Raines*, 362 U. S. 17, 20–22, or to sever its problematic portions while leaving the remainder intact, *United States* v. *Booker*, 543 U. S. 220, 227–229. Three interrelated principles inform the Court's approach to remedies. First, the Court tries not to nullify more of a legislature's work than is necessary. Second, mindful that its constitutional mandate and institutional competence are limited, the Court restrains itself from "rewrit[ing] state law to confirm it to constitutional requirements." *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 397. Third, the touchstone for any decision about remedy is legislative intent. After finding an application or portion of a statute unconstitutional, the Court must ask: Would the legislature have preferred what is left of its statute to no statute at all? See generally, *e.g.*, *Booker*, *supra*, at 227. Here, the courts below chose the most blunt remedy—permanently enjoining the Act's enforcement and thereby invalidating it entirely. They need not have done so. In *Stenberg* v. *Carhart*, 530 U. S. 914—where this Court invalidated Nevada's "partial birth abortion" law in its entirety for lacking a health exception—the parties did not ask for, and this Court did not contemplate, relief more finely drawn, but here New Hampshire asked for and respondents recognized the possibility of a more modest remedy. Only a few applications of the Act would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the Act's unconstitutional application. On remand, they should determine in the first instance whether the legislature intended the statute to be susceptible to such a remedy. Pp. 6–10.

(c) Because an injunction prohibiting unconstitutional applications or a holding that consistency with legislative intent requires invalidating the statue *in toto* should obviate any concern about the Act's life exception, this Court need not pass on the lower courts' alternative holding. If the Act survives in part on remand, the Court of Appeals should address respondents' separate objection to the judicial

Syllabus

bypass' confidentiality provision. P. 10.

390 F. 3d 53, vacated and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

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SUPREME COURT OF THE UNITED STATES

No. 04–1144

KELLY A. AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE, PETITIONER *v.* PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January 18, 2006]

JUSTICE O'CONNOR delivered the opinion of the Court.

We do not revisit our abortion precedents today, but rather address a question of remedy: If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response? We hold that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief.

I

A

In 2003, New Hampshire enacted the Parental Notification Prior to Abortion Act. N. H. Rev. Stat. Ann. §§132:24–132:28 (Supp. 2004). The Act prohibits physicians from performing an abortion on a pregnant minor (or a woman for whom a guardian or conservator has been appointed) until 48 hours after written notice of the pending abortion is delivered to her parent or guardian. §132:25(I). Notice may be delivered personally or by

certified mail. §§132:25(II), (III). Violations of the Act are subject to criminal and civil penalties. §132:27.

The Act allows for three circumstances in which a physician may perform an abortion without notifying the minor's parent. First, notice is not required if "[t]he attending abortion provider certifies in the pregnant minor's record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." §132:26(I)(a). Second, a person entitled to receive notice may certify that he or she has already been notified. §132:26(I)(b). Finally, a minor may petition a judge to authorize her physician to perform an abortion without parental notification. The judge must so authorize if he or she finds that the minor is mature and capable of giving informed consent, or that an abortion without notification is in the minor's best interests. §132:26(II). These judicial bypass proceedings "shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay," and access to the courts "shall be afforded [to the] pregnant minor 24 hours a day, 7 days a week." §§132:26(II)(b), (c). The trial and appellate courts must each rule on bypass petitions within seven days. *Ibid.*

The Act does not explicitly permit a physician to perform an abortion in a medical emergency without parental notification.

B

Respondents are Dr. Wayne Goldner, an obstetrician and gynecologist who has a private practice in Manchester, and three clinics that offer reproductive health services. All provide abortions for pregnant minors, and each anticipates having to provide emergency abortions for minors in the future. Before the Act took effect, respondents brought suit under 42 U. S. C. §1983, alleging that the Act is unconstitutional because it fails "to allow a

physician to provide a prompt abortion to a minor whose health would be endangered" by delays inherent in the Act. App. 10 (Complaint, ¶24). Respondents also challenged the adequacy of the Act's life exception and of the judicial bypass' confidentiality provision.

The District Court declared the Act unconstitutional, see 28 U. S. C. §2201(a), and permanently enjoined its enforcement. It held, first, that the Act was invalid for failure "on its face . . . to comply with the constitutional requirement that laws restricting a woman's access to abortion must provide a health exception." *Planned Parenthood of Northern New Eng.* v. *Heed*, 296 F. Supp. 2d 59, 65 (NH 2003). It also found that the Act's judicial bypass would not operate expeditiously enough in medical emergencies. In the alternative, the District Court held the Act's life exception unconstitutional because it requires physicians to certify with impossible precision that an abortion is "necessary" to avoid death, and fails to protect their good faith medical judgment.

The Court of Appeals for the First Circuit affirmed. Citing our decisions in *Stenberg* v. *Carhart*, 530 U. S. 914, 929–930 (2000), *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 879 (1992) (plurality opinion), and *Roe* v. *Wade*, 410 U. S. 113, 164–165 (1973), it observed: "Complementing the general undue burden standard [for reviewing abortion regulations], the Supreme Court has also identified a specific and independent constitutional requirement that an abortion regulation must contain an exception for the preservation of the pregnant woman's health." *Planned Parenthood of Northern New Eng.* v. *Heed*, 390 F. 3d 53, 58 (2004). It went on to conclude that the Act is unconstitutional because it does not contain an explicit health exception, and its judicial bypass, along with other provisions of state law, is no substitute. The Court of Appeals further found the Act unconstitutional because, in its view, the life exception forces physicians to

gamble with their patients' lives by prohibiting them from performing an abortion without notification until they are certain that death is imminent, and is intolerably vague. Because the district and appellate courts permanently enjoined the Act's enforcement on the basis of the above infirmities, neither reached respondents' objection to the judicial bypass' confidentiality provision.

We granted certiorari, 544 U. S. __ (2005), to decide whether the courts below erred in invalidating the Act in its entirety because it lacks an exception for the preservation of pregnant minors' health. We now vacate and remand for the Court of Appeals to reconsider its choice of remedy.

II

As the case comes to us, three propositions—two legal and one factual—are established. First, States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their "strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson* v. *Minnesota*, 497 U. S. 417, 444–445 (1990) (opinion of STEVENS, J.).[1] Accordingly, we have long upheld state parental

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[1]Forty-four States, including New Hampshire, have parental involvement (that is, consent or notification) laws. Thirty-eight of those laws have explicit exceptions for health or medical emergencies. Ala. Code §26–21–5 (1992); Alaska Stat. §18.16.060 (2004); Ariz. Rev. Stat. Ann. §36–2152(G)(2) (West 2003); Ark. Code Ann. §§20–16–802(2), 20–16–805(1) (Supp. 2005); Cal. Health & Safety Code Ann. §123450 (West 1996); Colo. Rev. Stat. §12–37.5–103(5) (2004); Del. Code Ann., Tit. 24, §§1782(d), 1787 (1997); Fla. Stat. Ann. §§390.01114(2)(d), (3)(b) (West Supp. 2006); Ga. Code Ann. §15–11–116 (2005); Idaho Code §18–609A(1)(a)(v) (Lexis 2005); Ill. Comp. Stat., ch. 750, §70/10 (West 2004); Ind. Code §16–34–2–4 (West 2004); Iowa Code §135L.3 (2005); Kan. Stat. Ann. §65–6705(j)(1)(B) (2002); Ky. Rev. Stat. Ann. §§311.720, 311.732 (West Supp. 2005); La. Stat. Ann. §40:1299.35.12 (West Supp.

involvement statutes like the Act before us, and we cast no doubt on those holdings today. See, *e.g.*, *Lambert* v. *Wicklund*, 520 U. S. 292 (1997) *(per curiam)*; *Casey*, *supra*, at 899 (joint opinion); *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 510–519 (1990); *Hodgson*, 497 U. S., at 461 (O'CONNOR, J., concurring in part and concurring in judgment in part); *id.*, at 497–501 (KENNEDY, J., concurring in judgment in part and dissenting in part).[2]

Second, New Hampshire does not dispute, and our

2005); Mass. Gen. Laws, ch. 112, §12S (West 2004); Mich. Comp. Laws §§722.902(b), 722.905 (2002); Miss. Code Ann. §41–41–57 (2005); Mont. Code Ann. §§50–20–203(5), 50–20–208 (2005); Neb. Rev. Stat. §71–6906(1) (2003); Nev. Rev. Stat. §442.255(1) (2003); N. J. Stat. Ann. §§9:17A–1.3, 9:17A–1.6 (West 2002); N. M. Stat. Ann. §30–5–1 (2004); N. C. Gen. Stat. Ann. §90–21.9 (Lexis 2003); N. D. Cent. Code Ann. §§14–02.1–03(1), 14–02.1–03.1(2) (Lexis 2004); Ohio Rev. Code Ann. §2919.121(D) (Lexis 2003); Okla. Stat., Tit. 63, §1–740.2(B) (West Supp. 2006); 18 Pa. Cons. Stat. §§3203, 3206 (2002); R. I. Gen. Laws §23–4.7–4 (1996); S. C. Code Ann. §44–41–30(C)(1) (2002); 2005 S. D. Laws p. 189; Tenn. Code Ann. §37–10–305 (2005); Tex. Occ. Code Ann. §164.052(a)(19) (West Supp. 2005), Tex. S. B. 419 (2005); Utah Code Ann. §§76–7–301(2), 76–7–305 (Lexis Supp. 2005); Va. Code Ann. §18.2–76 (2004); W. Va. Code §16–2F–3 (Lexis 2001); Wis. Stat. §48.375 (2003–2004). Two States give physicians sufficient discretion to perform an abortion to protect minors' health. Me. Rev. Stat. Ann., Tit. 22, §1597–A (2004); Md. Health Code Ann. §20–103 (2005). Four, including New Hampshire, make no exception for minors' health in an emergency. N. H. Stat. §132:26 (2005); Minn. Stat. §144.343 (2004); Mo. Rev. Stat. §188.028 (2000); Wyo. Stat. Ann. §35–6–118 (2003).

[2]It is the sad reality, however, that young women sometimes lack a loving and supportive parent capable of aiding them "to exercise their rights wisely." *Hodgson*, 497 U. S., at 444; see *id.*, at 450–451 and n. 36 (holding unconstitutional a statute requiring notification of both parents, and observing that "the most common reason" young women did not notify a second parent was that the second parent "was a child- or spouse-batterer, and notification would have provoked further abuse" (citation omitted)). See also Department of Health and Human Services, Administration on Children, Youth and Families, Child Maltreatment 2003, p. 63 (2005) (parents were the perpetrators in 79.7% of cases of reported abuse or neglect).

precedents hold, that a State may not restrict access to abortions that are "'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'" *Casey*, 505 U. S., at 879 (plurality opinion) (quoting *Roe*, 410 U. S., at 164–165); see also *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 768–769 (1986); *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, 482–486 (1983) (opinion of Powell, J.); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 79 (1976).

Third, New Hampshire has not taken real issue with the factual basis of this litigation: In some very small percentage of cases, pregnant minors, like adult women, need immediate abortions to avert serious and often irreversible damage to their health. See 296 F. Supp. 2d, at 65, n. 4.

New Hampshire has maintained that in most if not all cases, the Act's judicial bypass and the State's "competing harms" statutes should protect both physician and patient when a minor needs an immediate abortion. See N. H. Rev. Stat. Ann. §627:3(I) (1996) (for criminal liability, "[c]onduct which the actor believes to be necessary to avoid harm to . . . another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the offense charged"); §627:1 (similar for civil liability). But the District Court and Court of Appeals found neither of these provisions to protect minors' health reliably in all emergencies. 296 F. Supp. 2d, at 65–66; 390 F. 3d, at 61–62. And New Hampshire has conceded that, under our cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks. See Reply Brief for Petitioner 2, 8, 11; Tr. of Oral Arg. 6, 14.

III

We turn to the question of remedy: When a statute

restricting access to abortion may be applied in a manner that harms women's health, what is the appropriate relief? Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, see *United States* v. *Raines*, 362 U. S. 17, 20–22 (1960), or to sever its problematic portions while leaving the remainder intact, *United States* v. *Booker*, 543 U. S. 220, 227–229 (2005).

Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary, for we know that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan* v. *Time, Inc.*, 468 U. S. 641, 652 (1984) (plurality opinion). It is axiomatic that a "statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289 (1921). Accordingly, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985); see also *Tennessee* v. *Garner*, 471 U. S. 1 (1985); *United States* v. *Grace*, 461 U. S. 171, 180–183 (1983).

Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] state law to conform it to constitutional requirements" even as we strive to salvage it. *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 397 (1988). Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy. In *United States* v. *Grace*, *supra*, at

180–183, for example, we crafted a narrow remedy much like the one we contemplate today, striking down a statute banning expressive displays only as it applied to public sidewalks near the Supreme Court but not as it applied to the Supreme Court Building itself. We later explained that the remedy in *Grace* was a "relatively simple matter" because we had previously distinguished between sidewalks and buildings in our First Amendment jurisprudence. *United States* v. *Treasury Employees*, 513 U. S. 454, 479, n. 26 (1995). But making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake. *Ibid.*

Third, the touchstone for any decision about remedy is legislative intent, for a court cannot "use its remedial powers to circumvent the intent of the legislature." *Califano* v. *Westcott*, 443 U. S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part); see also *Dorchy* v. *Kansas*, 264 U. S. 286, 289–290 (1924) (opinion for the Court by Brandeis, J.). After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? See generally *Booker*, *supra*, at 227; *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 191 (1999); *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987); *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932); *The Employers' Liability Cases*, 207 U. S. 463, 501 (1908); *Allen* v. *Louisiana*, 103 U. S. 80, 83–84 (1881); *Trade-Mark Cases*, 100 U. S. 82, 97–98 (1879). All the while, we are wary of legislatures who would rely on our intervention, for "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied. *United*

States v. *Reese*, 92 U. S. 214, 221 (1876). "This would, to some extent, substitute the judicial for the legislative department of the government." *Ibid.*

In this case, the courts below chose the most blunt remedy—permanently enjoining the enforcement of New Hampshire's parental notification law and thereby invalidating it entirely. That is understandable, for we, too, have previously invalidated an abortion statute in its entirety because of the same constitutional flaw. In *Stenberg*, we addressed a Nebraska law banning so-called "partial birth abortion" unless the procedure was necessary to save the pregnant woman's life. We held Nebraska's law unconstitutional because it lacked a health exception. 530 U. S., at 930 (lack of a health exception was an "independent reaso[n]" for finding the ban unconstitutional). But the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn.

In the case that is before us, however, we agree with New Hampshire that the lower courts need not have invalidated the law wholesale. Respondents, too, recognize the possibility of a modest remedy: They pleaded for any relief "just and proper," App. 13 (Complaint), and conceded at oral argument that carefully crafted injunctive relief may resolve this case, Tr. of Oral Arg. 38, 40. Only a few applications of New Hampshire's parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application.

There is some dispute as to whether New Hampshire's legislature intended the statute to be susceptible to such a remedy. New Hampshire notes that the Act contains a severability clause providing that "[i]f any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not

affect the provisions or applications of this subdivision which can be given effect without the invalid provisions or applications." §132:28. Respondents, on the other hand, contend that New Hampshire legislators preferred no statute at all to a statute enjoined in the way we have described. Because this is an open question, we remand for the lower courts to determine legislative intent in the first instance.

IV

Either an injunction prohibiting unconstitutional applications or a holding that consistency with legislative intent requires invalidating the statute *in toto* should obviate any concern about the Act's life exception. We therefore need not pass on the lower courts' alternative holding. Finally, if the Act does survive in part on remand, the Court of Appeals should address respondents' separate objection to the judicial bypass' confidentiality provision. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.